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Can a charge of perjury be predicated upon an oath taken before a mere *de facto* officer? It is a general rule of universal application that the acts of an officer who comes into possession of an office under the forms of law and who assumes to act, are deemed to be legal and binding as to the public, and all persons who have any interest in the things done by him, and that the acts of a *de facto* judge cannot be collaterally attacked. It was claimed in the recent case of State v. Williams before the Supreme Court of Kansas that an exception to this rule is made in cases of perjury and some English courts apparently support the view that perjury cannot be assigned on an oath administered by an officer *de facto*. Rex v. Verelst, 3 Camp. 432. Some of the courts of this country have followed the doctrine of the English cases, examples of which are Biggerstaff v. Com., 11 Bush, 169; Muir v. State, 8 Blackf. 154; Staight v. State, 39 Ohio St. 496. The case last cited was again considered by the Supreme Court of Ohio in State v. Gardner, 54 Ohio St. 24, and the court there remarked that the person who administered the oath in that case had received no appointment and had taken no oath, and as he lacked color of title he could not be regarded as an officer *de facto*. Therefore the Ohio case cannot be regarded as an authority for the English view. In Bishop's New Criminal Law, § 464, it is said that "the author submits that the English doctrine dates from a period long since the revolution; that the judges propounding it did not think of the true reasoning applicable to the question; that so did not such American judges as have followed it, and that the accurately considered law of perjury, while it requires a jurisdiction in the tribunal and the like, punishes false swearing to a relevant matter before it whenever it holds the parties bound by its judgment." Citing Haward v. Sexton, 1 Denio, 440; People v. Cook, 8 N. Y. 67. In Lambert v. People, 76 N. Y. 220, this question was considered, and, while there was a division of opinion on some phases of it, the court held that a *de facto* title is sufficient to authorize the lawful administration of an oath, and that a commission regular on its face is unimpeachable. Some members of the court appear to have followed the doctrine of Rex v. Verelst, *supra*, holding that an oath administered by a person who never had any power to act, and where there was an entire want of authority from the beginning—a mere intruder in fact—could not be made the basis of a prosecution for perjury. In such a case something more must be shown than that a party has merely acted as an officer; but it is held that, where an appointment has been made by the appointing authority, and the officer has the color of office, and a semblance of competent authority, he is to be regarded as an officer *de facto*, and the matter of subsequent disability, non-residence or the like cannot be made the subject of inquiry in a perjury case.

The Kansas court following this rule in the Williams case, says that "in this country the *de facto* doctrine applies to the fullest extent, and we can think of no good reason why an exception should be made for the protection of those guilty of swearing falsely when their testimony may be made the basis of a conclusive judgment in either civil or criminal proceedings."

In a recent case before the United States Circuit Court of Appeals for the Seventh Circuit—*In re* Jerome L. Taylor—a question of interest concerning the United States Bankruptcy Act arose. The Bankruptcy law provides that any natural person except a wage-earner or a person engaged chiefly in farming or the tillage of the soil * * * may be adjudged an involuntary bankrupt upon default or an impartial trial. The alleged bankrupt did not appear or answer, but the appellant who had obtained a lien upon this property, appeared and set up the fact in an answer. There was nothing in the petition to bring the alleged bankrupt within the terms of the statute. It did not allege what the defendant's business or occupation was, and there was no allegation to show that he did not come within the excepted classes.

"Farmers and wage-earners," says United States Judge Bunn, in deciding the case,

"constitute a large majority of the people. These are excepted from that portion of the clause relating to involutary bankruptcy, and the petition should either have shown what the business of the defendant was, or that he did not come within the excepted classes. The answer set up this fact, the allegations of which, when the case was submitted on the pleadings, without proofs taken, must and would have been taken as true had not the court sustained the exceptions of the petitioners to the appellant's answer. The answer was a good and valid answer to the petition and the exceptions to it should not have been sustained by the court. The statute expressly provides that creditors other than the original petitioners may file an answer and be heard in opposition to the prayer of the petition. If they can appear in the case and file an answer, then it follows that they can set up any facts which go to defeat the proceeding.

If the answer made by the appellant was true, then it was not a case for involuntary bankruptcy and should have been dismissed. If Taylor was simply a farmer or chiefly a farmer, and engaged in the tilling of the soil, there was no authority or jurisdiction under the law to force him into bankruptcy. The appellant might gain a rightful preference by obtaining judgments, as it did and issuing executions, which, in the hands of the sheriff became a lien upon the defendant's property. This being the case, and the appellant being the real party in interest it would be very strange if it could not set up the only plea which could avail to protect its property rights, so legally acquired. If the facts alleged in the answer were true it had a vested right which could not be taken away by the default of the defendant in the bankruptcy proceeding to appear and answer nor without due process of law and a hearing in court. These the appellant has not had. If the petitioning creditors wish to contest the question raised by the answer, there should have been a replication put in denying the allegations and a trial had before an adjudication was made. Simpson v. Ready, 12 M. & W. 740; Vavasour v. Ormrod, 6 B. & C. 430; Potter's Dwarris on Stat. & Cons., 119; Maxwell Land Grant Co. v. Lawson, 151 U. S. 586; Leidigh Carriage Co. v. Stengel, 2 Am. Bank. Rep. 383; Sturges v. Croninshield, 4 Wheat. 122; Geo. M. West Co. v. Lea Bros. & Co., 2 Am. Bank. Rep. 463."

NOTES OF IMPORTANT DECISIONS.

CORPORATIONS—PROMOTER.—In Hayward v. Leeson, 75 N. E. Rep. 656, decided by the Supreme Judicial Court of Massachusetts it appeared that promoters of a corporation, subsequent to the creation thereof, and while they were the sole stockholders, voted to issue its corporate stock to themselves in payment for services rendered in securing options of land, which they assigned to the corporation. The stock so issued equaled the estimated profits to be derived from such options. Thereafter the promoters invited the public to subscribe to the stock, without disclosing the facts as to such stock to the subscribers, or getting their consent to the payment of such remuneration. It was held that they were guilty of a fraud, and the company can, without returning the lands acquired under the options, maintain an action for the recovery of such stock, or damages for the loss thereof; that promoters of a corporation, who have incurred expenses and paid out money in procuring options for the benefit of the prospective corporation, are entitled to reimbursement therefor on creation of the corporation and that persons who were promoters of a corporation, and who, while they were the sole stockholders, procured the issuance to themselves of shares of the capital stock of the corporation in payment of secret profits made by them from the sale of property owned by them to the corporation, may be compelled to account for the shares so received, with dividends thereon received by them, or the proceeds of a sale thereof by them, if sold, with interest from the date of the sale, or for the fair market value of the stock at the time of its issuance, or, if it had no market value at the time of issuance, for the reason that the corporation was not yet launched, then the value at the time a market value may be found to have been established.

INTOXICATING LIQUOR—TRIAL—PERMITTING JURY TO TASTE.—In People v. Kinney, 83 N. W. Rep. 147, decided by the Supreme Court of Michigan, it was held that where a bottle of cider is admitted as evidence in a prosecution for selling fermented liquor, it is not error to permit the members of the jury to taste the contents, where the evidence tends to show that the cider is in the same condition as when purchased. The court said in part:

"After Mahoney had given his testimony, the prosecution offered the bottle of cider in evidence. Counsel for respondent objected to this offer on the ground that it was incompetent, irrelevant and immaterial. The court said: 'Unless the evidence in this case shows that the contents of

this bottle is in the same condition it was on October 5th, it would be of no value as evidence; but, if the evidence has any tendency to show it in the same condition, it would be admissible.' It was received in evidence, and the court then said: 'There is a tumbler, gentlemen, if you want to taste of it—any of you.' Respondent's counsel objected to these remarks of the court, instructing the jury that they might taste it. The argument of respondent's counsel here is that if the jury, by tasting it, smelling or drinking it, as they were ordered by the court, thereby acquired knowledge or formed opinions of its properties as to whether it was hard or fermented cider, those tasting or smelling it could not give evidence to their fellow-jurors without being sworn. There is nothing in the record showing or tending to show that any of the jurors smelled or drank of it, nor is there any evidence that the bottle was placed in their hands for examination. The record is entirely silent upon that subject; but, even if it had been handed them and they had tasted it, we think it would not have been error. The testimony of Mahoney, who put it in the bottle, tended to show that it was in about the same condition as when sold by the respondent."

BANKRUPTCY—ASSETS—LIFE INSURANCE.—In Morris v. Dodd, decided by the Supreme Court of Georgia, it is held, reversing the lower court, that a policy of insurance on the life of a bankrupt, though payable to his legal representative, does not, if it have no cash surrender value, vest in the trustee as assets of the bankrupt's estate. Accordingly, where a husband, within four months prior to the filing of his petition in bankruptcy, transferred to his wife an insurance policy on his life, which before such transfer was payable to his legal representatives, it was erroneous, on the petition of the trustee, filed upon the death of the bankrupt, pending the proceedings in bankruptcy, for the court to enjoin the widow from collecting, and the insurance company from paying to her, the amount due upon the policy; it appearing that it had no cash surrender value, either when the transfer was made or the petition in bankruptcy was filed. The court says in part:

"Section 67e of the Bankrupt Act of 1898, provides 'that all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors or any of them, shall be null and avoid as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed,' etc., 'shall * * * be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors.' Section 70a of the act provides: 'The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum ascertained and stated, and continue to hold, own, and carry such policy free from claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets.' Under the view we take of the question presented for determination, it is immaterial that the policies of insurance were transferred by the bankrupt to his wife within four months prior to the filing of his petition in bankruptcy. Upon the hearing, there was no evidence submitted for the trustee that either of the policies had any cash surrender value, either at the time of the transfer or at the time of the filing of the petition in bankruptcy, but there was much evidence in behalf of the defendants that the policies had no such value at either of the times indicated. If the policies, then, had no cash surrender value, we are of the opinion that they would not vest in the trustee, as assets of the bankrupt's estate, even if no changes had been made in them, and they had, to the date of his death, remained payable to his legal representatives. The exact point was decided in *Re* Buelow (D. C.), 98 Fed. Rep. 86, where it was held: 'A policy of insurance on the life of a bankrupt, which has no cash surrender value and no value for any purpose except the contingency of its becoming valuable at the death of the bankrupt if the premiums are kept paid, does not vest in the trustee as assets of the estate;' and the court directed the trustee to deliver the policy to the petitioners, the bankrupt and his wife. District Judge Shiras, in *Re* Steele (D. C.), 98 Fed. Rep. 78, while holding that where a bankrupt held a policy payable to himself, his heirs or legal representatives, the surrender value thereof would be part of the assets of his estate in bankruptcy, very clearly intimated that this would not be so if the policy had no cash surrender value. To the same effect, see *In re* Lange (D. C.), 91 Fed. Rep. 361. In the case of Ætna Nat. Bank v. United States Life Ins. Co. (C. C.), 24 Fed. Rep. 770, it was held that a bill in equity could be maintained by creditors of a deceased debtor to reach premiums

paid to a life insurance company in fraud of them, but that they could have no claim upon the insurance, even in such a case, beyond the amount of the premiums and the interest thereon. Under the bankruptcy act of 1867, in *Re* McKinney (D. C.), 15 Fed. Rep. 535, it was held: "An assignee in bankruptcy has no insurable interest in the life of a bankrupt, at least after his discharge. Upon a policy on the life of the bankrupt, payable at his death to his executors, administrators, or assigns, with an equal premium payable annually during the bankrupt's life, the only beneficial interest which passes to the assignee in bankruptcy is its surrender value or net reserve at the time of the bankruptcy. Beyond that interest the policy, so far as respects any future insurance under it, would be a burden rather than a benefit, which the assigns are not authorized to continue, and the assignee takes the legal title to the policy for the purpose of making the surrender value or net reserve available to the estate.' In Holt v. Everall, an English case, decided by the court of appeal, under the British bankruptcy act of 1869, reported in 34 Law T. (N. S.) 599, it appeared that in 1870 a trader effected policies of insurance on his own life. In the following year, wishing his wife might have the benefit of the policies, under the married woman's act, he surrendered them to the insurance company, and received in substitution therefor policies at the same premiums, payable on the same day, and entitled to the same privileges, as the former, and which provided that the sums assured should be paid to the wife. Within two years from the date of the substitute policies the husband liquidated, dying before the discharge. The trustee claimed the insurance. It was held that, as the policies of 1870 had no surrender value, the transaction of the following year was not a settlement of property, under the bankruptcy act of 1869, and that the widow was entitled to the policy money. In speaking of the substitution of one policy for another, James, L. J., in his opinion said: 'If it could be made out that this was a device to avoid the ninety-first section of the bankruptcy act of 1869, and that there was any actual property—anything which the court could construe as of value—settled at that time, then probably the court would say: We cannot allow a device to be resorted to for the purpose of making that thing appear to be not a settlement which was in truth a settlement. * * * In that point of view, it is important to see whether there was any actual property—anything that could be called property—at the time when the husband effected the policies in question. If the husband at that time gave up anything of real value as part of the consideration for the new policies, there might be some question; but I am satisfied that that which was given up was not of the slightest value whatever, that there was nothing taken away from the creditors in point of substance, and that the transaction, as far as the creditors were concerned, was, in substance, exactly the same as if the policies in 1871 had been made without any reference whatever to the existing policies of 1870, which the husband might have given up at any moment he liked, or forfeited, or done anything he liked with. Therefore there is nothing substantial arising from the fact that the policies of 1871 were in exchange for the policies of 1870.' Mellish, L. J., in his concurring opinion, used the following language: 'I agree with the lord justice * * * that if the surrender policy really was in substance worth nothing, if it was a policy which an insolvent man would naturally allow to drop, it is very difficult to see what object an insolvent trader, knowing that he is going to become a bankrupt, has in keeping up a policy on his life, and paying the premiums, knowing that the money will go for the benefit of his creditors, or perhaps not for their benefit, because, if the policy was such as this was, which had only been effected for a single year, it does no benefit to the creditors. What a trustee in bankruptcy does, if such a policy comes into his hands, is to see if he can get anything from the insurance office, and all the creditors are deprived of is the surrender value, of the policy; and if there is no surrender value we may consider that the new policy effected instead of it comes within the protection of the act [the married women's property act].' In Bank v. Loh, 104 Ga. 446, 31 S. E. Rep. 459, 44 L. R. A. 372, this court held that the only insurable interest a creditor has in the life of his debtor is for the purpose of indemnifying himself against the loss of his debt, and that such interest cannot exceed in amount that of the indebtedness to be secured. The purpose of the bankruptcy act is to take the property owned by the bankrupt when the petition is filed, and apply it towards the payment of his then existing debts, discharging him in due course from any further liability; his after-acquired property not being subject to such debts. This being true, it is apparent that the creditors represented by the trustee, whose debts cannot continue against the bankrupt, can have no insurable interest in his life for the purpose of indemnifying themselves against loss. In view, therefore, of the authorities cited and the language of the act itself, it seems that a policy of insurance on the life of a bankrupt, though payable to his legal representatives, does not vest in the trustee, as assets of the bankrupt's estate, if the policy has no cash surrender value."

REAL ESTATE OPTIONS.

An option, sometimes termed "the refusal of property," is a contract by which the owner of property agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain. The op-

tion does not grant any interest in the land; neither is it a contract for its sale. The owner simply parts with his right to dispose of it for a limited period.[1] It is a unilateral contract and binding only upon the property owner who has signed it. The holder of the option is under no obligations to purchase the land. Before a sale, or a contract of sale, can result, the holder of the option must exercise his privilege, notify the owner of his election to purchase, and tender payment of the purchase price and performance of all conditions precedent.[2]

Formal Requisites.—The option must be in writing and signed by the owner of the land or his authorized agent, the contract being within the statute of frauds.[3] It is not *per se* fatal to the validity of an option that it is silent as to the length of time during which it shall run. If a consideration is present it will remain open for a reasonable time.[4]

Consideration.—An option, like all other contracts, requires a consideration to support it. If no consideration is present, a writing although in the form of an option is not a contract, but a mere offer to sell,[5] which may be withdrawn by the owner at any time before it has been accepted by the other party.[6] If, however, the offer is accepted by the other party in good faith, and such acceptance communicated to the owner before it is withdrawn, the owner is bound to make a conveyance, and the want of a consideration for the option is no excuse, for the acceptance of the offer to sell completes a contract of sale of the property.[7] When the option is granted by an instrument under seal, it has been held in a number of cases that, as the seal imports a consideration, the property owner cannot contradict the writing and show by parol that in fact the option was given without consideration.[8] This rule is denied in other cases.[9] In leases it is sometimes provided that the lessee shall have the right to purchase the property for a fixed sum at the expiration, or during the term of, the lease. In such cases the lessee's covenant to pay rent is alone a sufficient consideration for the option. It is presumed that his agreement to pay rent is not merely for the use of the premises, but is for the privilege of purchase as well, and a special or additional consideration for the option need not be present.[10] Every extension of the time of an option (although the option

[1] Ide v. Leiser, 10 Mont. 5, p. 11, 24 Am. St. Rep. 17, 24 Pac. Rep. 695; Gustin v. School District, 94 Mich. 502, 34 Am. St. Rep. 361; Richardson v. Hardwick, 106 U. S. 252; Bostwick v. Hess, 80 Ill. 138; Mers v. Franklin Insurance Co., 68 Mo. 127. "A present conveyance of lands is an executed contract. An agreement to sell is an executory contract. The sale of an option is an executed contract. That is to say, the lands are not sold. The contract is not executed as to them, but the option is as completely sold and transferred *in præsenti* as a piece of personal property instantly delivered on payment of the price." Ide v. Leiser, 10 Mont. 5, pages 11 and 12.

[2] Graybill v. Brugh, 89 Va. 895, 37 Am. Rep. 894, 17 S. E. Rep. 558; Burnet v. Bisco, 4 Johns. (N. Y.) 235; Faulkner v. Hebard, 26 Vt. 452; Litz v. Goosling, 93 Ky. 185, 19 S. W. Rep. 527; Weaver v. Burr, 31 W. Va. 736, 8 S. E. Rep. 743; Potts v. Whitehead, 20 N. J. Eq. 55; Barrett v. McAllister, 33 W. Va. 738, 12 S. E. Rep. 1106.

[3] Coleman v. Applegarth, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. Rep. 284.

[4] Kellow v. Jory, 141 Pa. St. 144, 21 Atl. Rep. 522; Hanly v. Watterson, 39 W. Va. 214, 19 S. E. Rep. 536; Vassault v. Edwards, 43 Cal. 459; Larmon v. Jordan, 56 Ill. 204.

[5] Weaver v. Burr, 31 W. Va. 736, 8 S. E. Rep. 743; Ide v. Leiser, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. Rep. 695; Gordon v. Darnell, 5 Colo. 302; Litz v. Goosling, 93 Ky. 185, 19 S. W. Rep. 527; Faulkner v. Hebard, 26, Vt. 452; Burnet v. Bisco, 4 Johns. (N. Y.) 235.

[6] Boston & Maine R. R. Co. v. Bartlett, 3 Cush. (Mass.) 224; Ide v. Leiser, 10 Mont. 5, 24 Am. St. Rep 17, 24 Pac. Rep. 695; Litz v. Goosling, 93 Ky. 185, 19 S. W. Rep. 527; Weaver v. Burr, 31 W. Va. 736, 8 S. E. Rep. 743; Larmon v. Jordan, 56 Ill. 204; Gordon v. Darnell, 5 Colo. 302; Bradford v. Foster, 87 Tenn. 4, 9 S. W. Rep. 195; Houghwout v. Boisaubin, 18 N. J. Eq. 315; Bean v. Burbank, 16 Me. 458, 33 Am. Dec. 681; Johnson v. Trippe, 33 Fed. Rep. 530; Burnet v. Bisco, 4 Johns. (N. Y.) 235; Mers v. Franklin Insurance Co., 68 Mo. 127; Perkins v. Hadsell, 50 Ill. 216; Dickinson v. Dodds, L. R. 2 Ch. Div. 463; Borst v. Simpson, 90 Ala. 373, 7 South. Rep. 814; Conner v. Renneker, 25 S. Car. 514; Easton v. Millington, 105 Cal. 49, 38 Pac. Rep. 509.

[7] Guyer v. Warren, 175 Ill. 328, 51 N. E. Rep. 580; Perkins v. Hadsell, 50 Ill. 216; Claanchi v. Branstatter, 84 Cal. 249; Houghwout v. Boisaubin, 18 N. J. Eq. 315; Ide v. Leiser, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. Rep. 695; Wall v. Ry. Co., 86 Wis. 48, 56 N. W. Rep. 367; House v. Jackson, 24 Oreg. 89, 32 Pac. Rep. 1027; Boston & Maine R. R. Co. v. Bartlett, 3 Cush. (Mass.) 224; Yerkes v. Richards, 153 Pa. St. 646, 34 Am. St. Rep. 721, 26 Atl. Rep. 221; Goodpaster v. Porter, 11 Iowa, 161

[8] Willard v. Tayloe, 8 Wall. (U. S.) 557; O'Brien v. Boriand, 166 Mass. 481, 44 N. E. Rep. 602; Guyer v. Warren, 175 Ill. 328, 51 N. E. Rep. 580; Hayes v. O'Brien, 149 Ill. 403, 37 N. E. Rep. 73; Faulkner v. Hebard, 26 Vt. 452; Weaver v. Burr, 31 W. Va. 786 (738), 8 S. E. Rep. 743.

[9] Graybill v. Brugh, 89 Va. 895, 37 Am. Rep. 894, 17 S. E. Rep. 558; Gordon v. Darnell, 5 Colo. 302.

[10] House v. Jackson, 24 Oreg. 89, 32 Pac. Rep. 1027; Schroeder v. Gemeinder, 10 Nev. 355; Herman v. Babcock, 103 Ind. 461; Souffrain v. McDonald, 27 Ind. 269; DeRutte v. Muldrow, 16 Cal. 505; Hawrelty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; Hayes v.

was supported by a consideration) must have a new consideration.[11]

Time.—Time is of the essence of this class of contracts, and the prospective purchaser must act strictly within the period limited, and communicate his acceptance to the owner before its expiration.[12] Where an option is to continue "until" a certain day, the acceptance may be made on the last day.[13] An option expires on the date specified without any action on the part of the owner of the land, and it is not necessary for him to give notice of forfeiture to its holder.[14] Unless specially provided in the option, the sale of the land need not be completed within the time limited. "Time is of the essence of the option, but not as to its performance;" and if the purchaser communicates his acceptance within the allotted time, the parties are entitled to a reasonable time thereafter in which to consummate the transaction.[15]

Withdrawal of Options.—If the option was given without consideration it is a mere offer, and may be recalled by the property owner at any time before acceptance, whether the time has expired or not.[16] But if accepted by the other party before it has been withdrawn, the owner is bound; the acceptance supplying the consideration and curing what before was a want of mutuality in the option.[17] When supported by a consideration the offer contained in the option cannot be withdrawn or revoked until the full time has expired.[18] In order to be affected by a withdrawal of an option, its holder must have notice or knowledge of the same.[19] It is not necessary that the notice of withdrawal be formal, or even express. If the owner disposes of his property to another person, and the holder of the option has knowledge of the same, it is an effectual withdrawal of the option, although no express notice is given.[20]

Remedies.—If a landowner refuses to complete the sale after the holder of the option has acted under it, and tendered payment and performance of his part of the contract, specific performance will be decreed.[21] An option may be assigned by its holder,[22] and the assignee may compel the owner to specifically perform the contract.[23] Specific performance will not be decreed against third persons who have become purchasers, for value, of the property in ignorance of the option.[24] But all purchasers having knowledge of the option will take subject to it.[25]

Options to Real Estate Brokers.—When an owner of property places it in the hands of a real estate broker for sale, it has been held that he may give an option to the broker

O'Brien, 149 Ill. 403, 37 N. E. Rep. 73; Hall v. Center, 40 Cal. 63.

[11] Coleman v. Applegarth, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. Rep. 284; Ide v. Leiser, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. Rep. 695.

[12] Weaver v. Burr, 31 W. Va. 736, 759, 8 S. E. Rep. 743; Barrett v. McAllister, 33 W. Va. 738, 12 S. E. Rep. 1106; Potts v. Whitehead, 20 N. J. Eq. 55, 59; Stembridge v. Stembridge, 87 Ky. 91, 7 S. W. Rep. 611; Longworth v. Mitchell, 26 Ohio St. 334; Vassault v. Edwards, 43 Cal. 458; Smith & Fleek's Appeal, 69 Pa. St. 474; Coleman v. Applegarth, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. Rep. 284; Borst v. Simpson, 90 Ala. 374, 7 South. Rep. 814; Bostwick v. Hess, 80 Ill. 138; Steele v. Bond, 32 Minn. 14; Richardson v. Hardwick, 106 U. S. 252; Dyer v. Duffy, 39 W. Va. 148, 19 S. E. Rep. 540, 24 L. R. A. 339.

[13] Houghwout v. Boisaubin, 18 N. J. Eq. 315.

[14] Cummings v. Town of Lake Realty Co., 86 Wis. 382, 57 N. W. Rep. 43; Bostwick v. Hess, 80 Ill. 138.

[15] Smith & Fleek's Appeal, 69 Pa. St. 474. *Contra:* Killough v. Lee, 2 Tex. Civ. App. 260.

[16] Larmon v. Jordan, 56 Ill. 204. See notes 5 and 6.

[17] See note 7.

[18] Schroeder v. Gemeinder, 10 Nev. 355; Hawralty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; Johnson v. Trippe, 33 Fed. Rep. 530; Guyer v. Warren, 175 Ill. 328, 51 N. E. Rep. 580; Hayes v. O'Brien, 149 Ill. 403 37 N. E. Rep. 73; Estes v. Furlong, 59 Ill. 298; House v. Jackson, 24 Oreg. 89, 32 Pac. Rep. 1027; Bradford v. Foster, 87 Tenn. 4, 9 S. W. Rep. 195; Linn v. McLean, 80 Ala. 360; Ross v. Parks, 93 Ala. 153, 30 Am St. Rep. 47; Gordon v. Darnell, 5 Colo. 302; Souffrain v. McDonald, 27 Ind. 269; Litz v. Goosling, 93 Ky. 185, 19 S. W. Rep. 527; DeRutte v. Muldrow, 16 Cal. 505.

[19] Dickinson v. Dodds, L. R. 2 Ch. Div. 463; Weaver v. Burr, 31 W. Va. 736, 8 S. E. Rep. 743.

[20] Coleman v. Applegarth, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. Rep. 284; Larmon v. Jordan, 56 Ill. 204; Dickinson v. Dodds, L. R. 2 Ch. Div. 463.

[21] Ross v. Parks, 93 Ala. 153, 30 Am. St. Rep. 47; Guyer v. Warren, 175 Ill. 328, 51 N. E. Rep. 580; Hayes v. O'Brien, 149 Ill. 403, 37 N. E. Rep. 73; Herman v. Babcock, 103 Ind. 461; Boston & Maine R. R. Co. v. Bartlett, 3 Cush. (Mass.) 224; Ide v. Leiser, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. Rep. 695; Schroeder v. Gemeinder, 10 Nev. 355; Houghwout v. Boisaubin, 18 N. J. Eq. 315; Smith & Fleek's Appeal, 69 Pa. St. 474; Bradford v. Foster, 87 Tenn. 4, 9 S. W. Rep. 195; Donnally v. Parker, 5 W. Va. 301; Willard v. Tayloe, 8 Wall. (U. S.) 557; Brown v. Slee, 103 U. S. 828; Watts v. Kellar, 56 Fed. Rep. 1; Johnson v. Trippe, 33 Fed. Rep. 530; Waterman v. Waterman, 27 Fed. Rep. 827; Dickinson v. Dodds, L. R. 2 Ch. Div. 461.

[22] House v. Jackson, 24 Oreg. 89, 32 Pac. Rep. 1027; Perkins v. Hadsell, 50 Ill. 216.

[23] Souffrain v. McDonald, 27 Ind. 269; House v. Jackson, 24 Oreg. 89, 32 Pac. Rep. 1027.

[24] Graybill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894, 17 S. E. Rep. 558.

[25] Ross v. Parks, 93 Ala. 153, 30 Am. St. Rep. 47; Barrett v. McAllister, 33 W. Va. 738, 12 S. E. Rep. 1106; Houghwout v. Murphy, 22 N. J. Eq. 531.

which will be binding.[26] Speaking, generally, the employment of a broker to sell real estate constitutes a contract of agency, while an option is a conditional agreement to make a contract, which, if made, creates the relation of vendor and purchaser between the parties. An option contract thus differs materially from a contract of agency. Options given to brokers are upheld upon the theory that they constitute a protection to the broker, and that an agreement on the part of the broker to use his best endeavors and skill to effect a sale of the property, followed by the actual performance of services, or the expenditure of money in advertising, etc., in endeavoring to sell the same, is a sufficient consideration for the principal's parting with his right of disposition for a limited period.[27] But where an option is given to the broker merely for the purpose of convenience, or to facilitate the sale, the broker cannot himself become the purchaser and enforce the option against his principal,[28] and it may be revoked at any time by the principal.[29]

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[26] Kellow v. Jory, 141 Pa. St. 144, 21 Atl. Rep. 522; Riemer v. Rice, 88 Wis. 16, 59 N. W. Rep. 450; Russell v. Andrae, 79 Wis. 108, 48 N. W. Rep. 117; Levy v. Roth, 39 N. Y. Suppl. 1057, 17 Misc. Rep. (N. Y.) 40; Huckabee v. Shepherd, 75 Ala. 342; Strange v. Gosse, 110 Mich. 153, 67 N. W. Rep. 1108; Copp v. Longstreet, 5Colo. App. 282, 38 Pac. Rep. 601.

[27] Stensgaard v. Smith, 43 Minn. 11, 19 Am. St. Rep. 205; Goward v. Waters, 98 Mass. 596; Chambers v. Seay, 73 Ala. 372; Attix v. Pelan, 5 Iowa, 336; Riemer v. Rice, 88 Wis. 16, 59 N. W. Rep. 450.

[28] Colbert v. Shepherd, 89 Va. 401, 16 S. E. Rep. 246.

[29] Easton v. Millington, 105 Cal. 49, 38 Pac. Rep. 509.

JURISDICTION OF UNITED STATES DISTRICT COURTS IN SUITS BY TRUSTEES IN BANKRUPTCY.

FRED BARDES v. THE FIRST NATIONAL BANK OF HAWARDEN, IOWA.

United States Supreme Court, May 28, 1900.

The provisions of section 23b of the Bankruptcy Act of 1898 control and limit the jurisdiction of all courts, including the several district courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors. The District Court of the United States can, by the proposed defendants' consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third parties before the institution of the proceedings in bankruptcy.

Appeal from the District Court of the United States for the Northern District of Iowa.

Mr. Justice Gray delivered the opinion of the court. This was a bill in equity, filed April 28, 1899, in the District Court of the United States for the Northern District of Iowa, sitting in bankruptcy, by Fred Bardes, a citizen of Iowa, as trustee in bankruptcy of the estate of Frank T. Walker (who had by that court been adjudged a bankrupt upon his own petition), against the First National Bank of Hawarden, Iowa, a corporation created and existing under the acts of congress relating to national banks, and against citizens of Iowa and of South Dakota, to set aside a conveyance of goods, of the value of $3,500, alleged to have been made by the bankrupt, within four months before the institution of the proceedings in bankruptcy, to the defendants, and to compel them to account for the goods or their proceeds, on the ground that the conveyance was in fraud of the provisions of the Bankrupt Act of July 1, 1898, and in fraud of the creditors of the bankrupt. The defendants demurred to the bill, upon the ground that the court could not take jurisdiction of the case. The court sustained the demurrer, and entered a final decree dismissing the bill for want of jurisdiction, but without prejudice to the plaintiff's right to institute proceedings in a court having jurisdiction. The plaintiff took an appeal directly to this court; and the district judge certified that the bill was dismissed for want of jurisdiction only, and, to the end that this court might be fully advised in the premises, stated in his certificate the following questions as having arisen before him, namely:

"1st. Do the provisions of the second clause of section 23 of the act of congress, known as the Bankrupt Act of 1898, control and limit the jurisdiction of all courts, including the several district courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors?

"2d. Can the District Court of the United States under any circumstances entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy?

"3d. Can this court, being the District Court for the Northern District of Iowa, take jurisdiction over the suit as it now stands on the record?"

The record clearly shows, with perhaps unnecessary fullness, that the case was decided upon questions of jurisdiction only, and what those questions were. Huntington v. Laidley, 176 U. S. 668, 676, and cases there cited.

At a former day of this term, a certificate made

by the district judge of the same questions, on which he desired the instruction of this court for his guidance, was dismissed by this court, because he was not authorized by the acts of congress to make such a certificate before deciding the case. Bardes v. Hawarden Bank, 175 U. S. 526, 3 Am. B. R. 680.

By the Bankrupt Act of July 1, 1898, ch. 541, trustees in bankruptcy, appointed by the creditors of the bankrupt, or by the court of bankruptcy, take the place and are vested with the powers of assignees in bankruptcy under former bankrupt acts. Among the duties imposed upon such trustees by section 47 are to "(2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court." By section 70, the trustees, upon their appointment and qualification, are vested by operation of law with the title of the bankrupt as of the date when he was adjudged a bankrupt, in all his property, excepting that exempt by law from execution and liability for debts, and including property transferred by him in fraud of his creditors. And by the fifth clause of section 67, "all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same, by legal proceedings or otherwise, for the benefit of the creditors." 30 Stat. 557, 564, 565.

The present appeal from the final decree of the district court, dismissing the bill for want of jurisdiction, distinctly presents for the decision of this court the question whether, under the Act of 1898, a district court of the United States in, which proceedings in bankruptcy have been commenced and are pending under the act, has jurisdiction to entertain a suit by the trustee in bankruptcy against a person holding, and claiming as his own, property alleged to have been conveyed to him by the bankrupt in fraud of creditors. This is a question of general importance, upon which there has been much difference of opinion in the lower courts of the United States.

Its determination depends mainly on the true construction of two sections of the Bankrupt Act of 1898, which it may be convenient to set forth in full, as follows: [Here the court sets out in full sections 2 and 23 of the Bankrupt Act of 1898.]

The question of the effect of these two sections, considering the language of each and their relation to one another, may be best approached by first referring to the terms and to the judicial construction of the Bankrupt Act of March 2, 1867, ch. 176, which was substantially re-enacted in the Revised Statutes, and afterwards repealed; and by them comparing the provisions of that act, as so construed, with those of the existing act.

In the Act of 1867, the provisions as to the jurisdiction of proceedings in bankruptcy, and as to the original jurisdiction of actions at law and suits in equity, were as follows:

[Here the court sets out in full, sections 1 and 2 of the Bankruptcy Act of 1867. The following clauses are of importance: In section 1: "And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy." In section 2: "Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee."]

In Lathrop v. Drake (1875), 91 U. S. 516, the jurisdiction conferred on the district courts and the circuit courts of the United States by the Bankrupt Act of 1867 was defined by this court, speaking by Mr. Justice Bradley, as consisting of "two distinct classes: first, jurisdiction, as a court of bankruptcy, over the proceedings in bankruptcy, initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or a refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him," and the jurisdiction of the district and circuit courts over suits to recover assets of the bankrupt from a stranger to the proceedings in bankruptcy, brought by the assignee in a district other than that in which the decree in bankruptcy had been made, was upheld, not under the provisions of section 1 of that act, giving to the district court original jurisdiction of proceedings in bankruptcy, and of section 2, giving to the circuit court supervisory jurisdiction over such proceedings; but wholly under the distinct clause of section 2, which gave to those two courts concurrent jurisdiction of all suits, at law or in equity, brought "by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee."

In an earlier case, it had been observed by Mr. Justice Clifford, delivering a judgment of this court dismissing an appeal from a decree of the circuit court in the exercise of its supervisory jurisdiction in bankruptcy, that the jurisdiction

conferred by the later clause was "other and different from the special jurisdiction and superintendence described in the first clause of the section;" was "of the same character as that conferred upon the circuit courts by the eleventh section of the Judiciary Act" of 1879, and was "the regular jurisdiction between party and party, as described in the Judiciary Act and the third article of the constitution." Morgan v. Thornhill (1870), 11 Wall. 65, 76, 80.

It was also repeatedly held by this court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person, who now claimed it adversely to the assignee, could only be enforced by a plenary suit, at law or in equity, under the second section of the Act of 1867; and not by summary proceedings under the first section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend "to the collection of all the assets of the bankrupt," and "to all acts, matters and things to be done under and in virtue of the bankruptcy" until the close of the proceedings in bankruptcy. Smith v. Mason (1871), 14 Wall. 419; Marshall v. Knox (1872), 16 Wall. 551, 557; Eyster v. Gaff (1875), 91 U. S. 521, 525.

The jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, as distinguished from independent suits at law or in equity, was of course exclusive. But it was well settled that the jurisdiction of such suits, conferred by the second section of the Act of 1867 upon the circuit and district courts of the United States for the benefit of an assignee in bankruptcy, was concurrent with that of the State courts. In Eyster v. Gaff, just cited, this court, speaking by Mr. Justice Miller, said: "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the State courts."

Under the Act of 1867, then, the distinction between proceedings in bankruptcy, properly so called, and independent suits, at law or in equity, between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared. Jurisdiction of such suits was conferred upon the district courts and circuit courts of the United States by the express provision to that effect in section 2 of that act, and was not derived from the other provisions of sections 1 and 2, conferring jurisdiction of proceedings in bankruptcy. And the jurisdiction of suits between assignees and adverse claimants, so conferred on the circuit and district courts of the United States, did not divest or impair the jurisdiction of the State courts over like cases.

The decisions of this court under the earlier Bankrupt Act of August 19, 1841, ch. 9, are very few in number, and afford little aid in the decision of the present case. The one most often cited in favor of maintaining such a suit as this under the existing law is *Ex parte* Christy (1845), 3 How. 292. But section 8 of the Act of 1841 contained the provision (afterwards embodied in section 2 of the Act of 1867, and above quoted) conferring on the circuit courts concurrent jurisdiction with district courts of suits, at law or in equity, between assignees in bankruptcy and adverse claimants of property of the bankrupt. 5 Stat. 446. And Mr. Justice Story in Christy's case considerably relied on that provision. 3 How. 314. Moreover, the only point necessary to the decision of that case was that this court had no power to issue a writ of prohibition to the district court sitting in bankruptcy; much of Mr. Justice Storey's opinion in favor of extending the jurisdiction of that court at the expense of the State courts is contrary to the subsequent adjudication of this court in Peck v. Jenness (1849), 7 How. 612; and in a still later case this court, speaking by Mr. Justice Curtis, said that the two former cases "are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression." Carroll v. Carroll (1853), 16 How. 275, 287.

We now recur to the provisions of the Act of 1898. This act has the somewhat unusual feature of inserting at the head of each section a separate title indicating its subject-matter.

Section 2 of this act is entitled "Creation of Courts of Bankruptcy and their Jurisdiction," takes the place of section 1 of the Act of 1867, and hardly differs from that section, except in the following particulars:

First. It begins by describing the jurisdiction conferred on "the courts of bankruptcy" as "such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings;" and it ends by declaring that "nothing in this section contained shall be construed to deprive a court of bankruptcy of any

power it would possess were certain specific powers not herein enumerated."

Second. It specifies in greater detail matters which are, in the strictest sense, proceedings in bankruptcy.

Third. It includes, among the powers specifically conferred on the courts of bankruptcy, those to "(4) arraign, try and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations, for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;" "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;" and "(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

The general provisions at the beginning and end of this section mention "courts of bankruptcy" and "bankruptcy proceedings."

Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words "at law," in the opening sentence conferring on the courts of bankruptcy "such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings," may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law and not in equity.

The section nowhere mentions civil actions at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers, in clause 6, to bring in and substitute additional parties "in proceedings in bankruptcy," and in clause 15, to make orders, issue process and enter judgments, "necessary for the enforcement of the provisions of this act."

The chief reliance of the appellant is upon clause 7. But this clause, in so far as it speaks of the collection, conversion into money and distribution of the bankrupt's estate, is no broader than the corresponding provisions of section 1 of the Act of 1867; and in that respect, as well as in respect to the further provision authorizing the court of bankruptcy to "determine controversies in relation thereto," it is controlled and limited by the concluding words of the clause, "except as herein otherwise provided."

These words, "herein otherwise provided," evidently refer to section 23 of the act, the general scope and object of which, as indicated by its title, are to define the "Jurisdiction of United States and State Courts" in the premises. The first and second clauses are the only ones relating to civil actions and suits at law or in equity.

The first clause provides that "the United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy" (thus clearly recognizing the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity, on the other), "between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees," restricting that jurisdiction, however, by the further words, "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." This clause, while relating to the circuit courts only, and not to the district courts of the United States, indicates the intention of congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.

But the second clause applies both to the district courts and to the circuit courts of the United States, as well as to the State courts. This appears, not only by the clear words of the title of the section, but also by the use in this clause of the general words, "the courts," as contrasted with the specific words, "the United States circuit courts," in the first and in the third clauses.

The second clause positively directs that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any State court of competent jurisdiction; or, if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the constitution, laws or treaties of the United States, he could have brought suit in the Circuit Court of the United States. Act of August 13, 1888, ch. 866; 25 Stat. 434. He could not have sued in a district court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of congress, a district court has the powers of a circuit court, or is given jurisdiction of a particular class of civil suits.

It was argued for the appellant that the clause cannot apply to a case like the present one, be-

cause the bankrupt could not have brought a suit to set aside a conveyance made by himself in fraud of his creditors. But the clause concerns the jurisdiction only, and not the merits, of a case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principle which must govern the decision. The bankrupt himself could have brought a suit to recover property, which he claimed as his own, against one asserting an adverse title in it; and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it.

The Bankrupt Acts of 1867 and 1841, as has been seen, each contained a provision conferring in the clearest terms on the circuit and district courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of property of the bankrupt. We find it impossible to infer that when congress, in framing the Act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts.

On the contrary, congress, by the second clause of section 23 of the present Bankrupt Act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States, "unless by consent of the proposed defendant," of which there is no pretense in this case.

One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the State, to the greater economy and convenience of litigants and witnesses. See Shoshone Mining Co. v. Rutter, 177 U. S. 505, 511, 513.

Two or three minor provisions of the Bankrupt Act of 1898, sometimes supposed to be inconsistent with this conclusion, may be briefly noticed.

Section 26 provides that the trustee may, pursuant to the direction of the court of bankruptcy, submit to arbitration any controversy arising in the settlement of the estate, and that the award of the arbitrators "may be filed in court," evidently meaning the court of bankruptcy. But no such arbitration could be had without the consent of the adverse party to the controversy in question.

The powers conferred on the courts of bankruptcy by clause 3 of section 2, and by section 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what courts the trustee may sue him.

The supervisory jurisdiction over proceedings in bankruptcy, conferred by the Act of 1867 upon the circuit courts of the United States, and by the existing act upon the circuit courts of appeals, does not affect this case. 30 Stat. 553.

For the reasons above stated, we are of opinion that the questions of jurisdiction certified by the district judge should be answered as follows:

"1st. The provisions of the second clause of section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several district courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.

"2d. The District Court of the United States can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy.

"3d. The District Court for the Northern District of Iowa cannot take jurisdiction over this suit as it now stands on the record."

The result is that the decree of the district court, dismissing the bill for want of jurisdiction, must be affirmed.

NOTE.—*Recent Decisions Construing the Jurisdiction of the United States Courts in Suits by Trustees, Under the New Act of Bankruptcy.*—The case of Bardes v. Bank has finally decided probably the most vexed and troublesome question arising under the provisions of the new Bankrupt Act—Have the district courts of the United States jurisdiction to hear and determine plenary actions at law, or in equity brought by trustees in bankruptcy against third parties to recover debts due the bankrupt or to set aside the latter's fraudulent transfer of his property? It was a question that arose often in every district court in the country, and much legal learning has been expended in the endeavor to reach a solution. The district courts, as a rule, asserted their own jurisdiction under the law, and were upheld by the circuit courts of appeals in the great majority of the decided cases. These cases are very numerous, but since, under the decision of the supreme court in the principal case, they have been practically overruled, it would serve no useful purpose to make any extended reference to them. Many various explanations of section 23b of the Bankrupt Act have been attempted in these decisions. One construction insists that the "suits" referred to were only those which "the bankrupt might have brought," and therefore could not have application to suits by the trustee to set aside fraudulent transfers by the bankrupt, since the bankrupt himself could not have brought such suits. *In re* Baudouine, 101 Fed. Rep.

574. This case goes further and decides a point not touched upon in the supreme court's decision, that the United States district courts have jurisdiction of "all controversies brought to it by an adverse claimant." Another construction of this section appears in the case of *In re* Sievers, 91 Fed. Rep. 366, in which Judge Adams stated his opinion that section 23b was a limitation upon the jurisdiction of the United States circuit courts only, and did not affect the jurisdiction of the district court. The same position was taken by Judge Evans in Louisville Trust Co. v. Marx, 98 Fed. Rep. 456, where it was held that a trustee of a bankrupt may bring suit in equity to set aside a fraudulent preference made by the bankrupt within four months before the adjudication. A third construction is to be found in the case of *In re* Woodbury, 98 Fed. Rep. 833, in which the court held that the district court had jurisdiction in suits by a trustee to set aside fraudulent conveyances made by a bankrupt, on the ground that "subdivision b of section 23 refers only to the personal privilege of the defendant to be sued in the district court in the district of which he is an inhabitant." In other words that section 23b does not relate to the jurisdiction of courts, but to the venue of suits. In this case Judge Amidon gave expression to probably the strongest consideration moving district judges in sustaining their own jurisdiction: "If not indispensable," says Judge Amidon, "to a uniform system of bankruptcy throughout the country, it would certainly be conducive to such a system that the federal courts should be vested with full jurisdiction for the purpose of securing the highest degree of uniformity in the interpretation and administration of the law. This has been the controlling consideration in construing all previous bankruptcy acts, and was, no doubt, present to the mind of congress in framing the statute of 1898."

The few cases which anticipated the ruling of the supreme court and are thereby sustained are interesting authority and will be briefly noted. Where, prior to this adjudication in bankruptcy, an insolvent debtor made a general assignment for the benefit of his creditors and subsequent to the filing of a petition in bankruptcy against the assignor, the assignee had sold the property of the bankrupt, and where, upon the petition of creditors of the bankrupt, the court of bankruptcy issued an order directing the marshal to seize the property so sold, and granted a rule directing the purchaser to appear before the court and prove his title to such property, held, the court of bankruptcy did not have jurisdiction by a summary proceeding to order the marshal to seize the property, nor did it have jurisdiction to try the question of the title of the purchaser of the bankrupt's property upon the sale by the assignee. The proper proceeding in such a case is a plenary action at law or in equity in the proper State or federal court. *In re* Abraham, 35 C. C. A. 592. When a trustee in bankruptcy brings an action to set aside a transfer of property made by the bankrupt either as a preference or without consideration and in violation of the act, when the complainant and defendant are citizens of the same State, the bankruptcy court has no jurisdiction. Perkins v. McCauley, 98 Fed. Rep. 287; Burnett v. Mercantile Co., 91 Fed. Rep. 365. An application for a warrant directing the marshal to seize property in the possession of third persons under claim of title, is wholly unauthorized by the Bankruptcy Act, even though it is claimed that the party holding the property received it by a transfer which is voidable or null under the act. It seems that the only remedy for the recovery of property preferentially or fraudulently transferred is found in section 60b of the Bankruptcy Act, except that in certain exigencies in aid of the proceedings in bankruptcy, proceedings in equity to provisionally seize property in the hands of adverse holders, may be instituted by a bill to which the adverse holders are made parties. *In re* Kelly, 91 Fed. Rep. 504. The district court cannot authorize a marshal to seize and hold property of a bankrupt in the hands of a third person, who claims title to such property by virtue of a chattel mortgage, and who took possession of the property prior to the filing of the petition. Section 69 is also construed in this opinion as only authorizing the seizure and holding such of property as is in the possession of the bankrupt. *In re* Rockwood, 91 Fed. Rep. 363. The District Court of the United States has no jurisdiction of an action of replevin, by the trustee of a bankrupt, to recover goods held by a person adversely under claim of title, where the bankrupt and person so holding are citizens of the same State. Mitchell v. McClure, 91 Fed. Rep. 621. Where a sheriff has sold property under an execution which is made null and void by a subsequent adjudication of bankruptcy against the execution debtor, and the proceeds remain in his hand at the time the trustee is appointed, the court of bankruptcy has no jurisdiction in a summary proceeding to direct the sheriff to pay the moneys over to the trustee. *In re* Franks, 93 Fed. Rep. 635. An excellent statement of this question was made by Judge Welborn in Perkins v. McCauley, *supra:* "I am fully satisfied, after careful consideration of the question, that the purpose of congress in the enacment of section 23 was, in part, to make the boundaries, under said act, between federal and State judiciaries, as to all controversies at law and in equity, as distinguished from proceedings in bankruptcy, coincident with the lines of demarkation then existing, thus giving an adverse claimant, against whom a trustee in bankruptcy asserted a cause of action, the privilege of being sued in local courts, and thereby saving to such claimant the burdensome expenses and costs necessarily incident to litigation in a distant tribunal, except in cases where, if the bankrupt had been plaintiff and proceedings in bankruptcy had not been instituted, the suit, because of diverse citizenship, or a federal question not related to the bankrupt act itself, and a requisite amount in controversy, could have been brought in the United States courts."

JETSAM AND FLOTSAM.

DUTY OF PUBLIC PROSECUTORS.

When District Attorney Randall said, the other day, to a reporter something that seemed to convey a confession that he was pretty well convinced of Benham's innocence of the crime with which Benham was charged all the while he was conducting the case for the people against Benham, he made a remark that was somewhat unfortunate because it was sure to suggest to many minds the old, blundering notion that, from the very nature of his professional duties, it is impossible for a lawyer in active court practice to be an honest man.

"Oh, horror. Here is a lawyer actually hounding to death as a murderer a man whom he believes to be innocent! Can anything more dishonest, more criminal, more villainous be imagined? How could Dis-

trict Attorney Randall lay his head upon his pillow, etc." This or something like it has probably been suggested to many minds by District Attorney Randall's unguarded and possibly misunderstood remark.

Now, who ever thought that, or anything like that, thought nonsense, even if we leave out of consideration the fact that District Attorney Randall could easily have overcome the suggested difficulty as to laying his head upon his pillow by adopting the simple expedition of laying his feet there. If District Attorney Randall, believing Benham innocent, still prosecuted Benham to the best of his ability, he took the only right and proper course open to him. If, merely because he happened to believe Benham innocent, he had refused to prosecute Benham or had prosecuted him negligently, had "ridden for a fall," so to say, he would have been false to his duty as a public prosecutor and would have deserved removal from his office. "But he could have entered a '*nolle prosequi.*'" "*Nolle prosequis*" are not entered because the public prosecutor happens to believe the accused person to be innocent. They are entered, for the saving of the taxpayers' money, because the public prosecutor doesn't believe the accused can be convicted. The distinction may be a fine one, but it is a real one.

You see the law does not provide that an accused person shall be tried by a public prosecutor or any other single individual, lawyer or layman. Indeed, it is one of the constitutional rights of an accused person in this country that he shall not be so tried, but shall be tried by a jury. Thus the judgment of an individual lawyer as to the guilt or innocence of an accused person whom he is called upon to prosecute or defend is not a factor in the case. If District Attorney Randall had said, "I believe this man to be innocent; I acquit him; I decline to prosecute him; I will use the opportunities my office give me to prevent him from being legally tried," he would have usurped the constitutional function of the jury and would have incurred a responsibility he had no business to undertake. Suppose, in spite of his belief, Benham had been guilty. What then?

So, if a lawyer called upon to defend an accused person says, "I believe you to be guilty, therefore I decline to defend you," has he not tried that accused person, passed judgment upon him, and sentenced him to deprivation of the legal services of his chosen counsel, in violation of his constitutional right to be tried by a jury and in violation of his constitutional right to be regarded as innocent until he has been proven guilty? Hasn't he violated his duty and his official oath as an officer of the court? It seems to us that there can be but one answer to these questions.

As to the "hounding to death," nonsense it may be suggested that, in theory at any rate, no public prosecutor is ever "hounding to death" an accused person whom he is prosecuting on a capital charge. In theory a public prosecutor has not, and in fact has no business to have, any personal animus against the accused, any personal eagerness to bring him to the gallows. It is most unfortunate and regrettable that public prosecutors, being human, too often have this personal eagerness to convict and allow it to appear in their manner of trying the case. It would be a great deal better for the dignity of the law and the certainty and celerity of justice if every criminal prosecution could be conducted by a public prosecutor if not convinced of the prisoner's innocence, at any rate entirely unconvinced of his guilt. A public prosecutor has no more right than you have to regard an accused person as otherwise than innocent until the accused person has been pronounced guilty, after a fair trial in accordance with the established forms of law, by a jury of his peers. The public prosecutors, as a rule, seem to be entirely unaware of this fact, dosen't affect the fact.—*Rochester Dem. & Chronicle.*

BOOKS RECEIVED.

The Law in its Relation to Physicians. By Arthur N. Taylor, LL.B., of the New York Bar. New York, D. Appleton & Company, 1900.

The Law of Real Property, Being a Complete Compendium of Real Estate Law, Embracing all Current Case Law, Carefully Selected, Thoroughly Annotated and Accurately Epitomized; Comparative Statutory Construction of the Laws of the Several States; and Exhaustive Treatises upon the Most Important Branches of the Law of Real Property. Edited by Emerson E. Ballard, Editor of "Deed Forms Annotated," and one of the Authors of "Ballards' Real Estate Statutes of Indiana," "Ballards' Real Estate Statutes of Kentucky," "Ballards' Ohio Law of Real Property," Vol. 6. Logansport, Ind., The Ballard Publishing Co. Sheep, pp. 912. Review will Follow.

A Complete Index to Ballards' Law of Real Property, Vols. I VI. Revised and Reprinted with Each new Volume of the Series. By Emerson E. Ballard. Logansport, Ind., The Ballard Publishing Co.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. APPEAL — Affirmance — Will — Construction.—A testator devised shares of stock to be paid to the legatee on a future date, or, in case of his death prior to that date, to his children "or their heirs in equal proportions, to have and to hold to him, her, or them, his, her, or their heirs or assigns, forever." Held, that the absolute ownership thereof vested in the children within the period measured by less than two designated lives in being at the testator's death; the words "or their heirs" being words of limitation, and not of substitution.—STEINWAY v. STEINWAY, N. Y., 57 N. E. Rep. 819.

2. APPEAL—Interlocutory Order.—Burns' Rev. St. 1894, § 480, provides that, on refusal of a witness to attend or testify, the court may order such witness to attend and testify, and, on failure to obey, he shall be dealt with as for a contempt. Held, that such order, being merely preliminary to an adjudication of contempt, is interlocutory, not final, and hence no appeal will lie therefrom.—RAY v. GLESSNER, Ind., 57 N. E. Rep. 243.

3. APPEAL FROM JUSTICE—Pleading — Witnesses—Judgment.—Under Sand. & H. Dig. § 2916, permitting a husband and wife to testify for the other in regard to any business transacted by the one for the other as agent, a husband and wife can both testify in a suit commenced by the husband as the agent of the wife.—GUNTER v. EARNEST, Ark., 56 S. W. Rep. 876.

4. ASSUMPSIT—Work and Labor—Pleading.—A plaintiff in *assumpsit* to recover an unpaid balance alleged that his assignor had "performed certain labor for and on behalf of defendant, and furnished to employees of defendant, at defendant's special instance and request," certain board and food. Held, that as defendant had not agreed to pay any specific sum, but simply to pay the amount of the account whenever ascertained, the complaint as to labor was insufficient in not stating that it was furnished at defendant's request, the clause in the complaint as to the board not being applicable to the clause as to the labor, and Code Civ. Proc. §§ 740, 778, providing that pleadings shall be liberally construed, not requiring the reading into pleading of an allegation which had been omitted therefrom.—CONRAD NAT. BANK v. GREAT NORTHERN RY. Co., Mont., 61 Pac. Rep. 1.

5. ATTACHMENT—Wrongful Attachment—Exemplary Damages.—Exemplary damages cannot be recovered for the wrongful issue of an attachment, when it was not sued out maliciously. Where, in an action for damages for wrongful attachment, the evidence shows that plaintiff was only damaged to the extent of $4, a judgment in his favor for $16 will be reversed unless within 15 days he remits all over $4.—ADKINS v. LACY, Ark., 56 S. W. Rep. 876.

6. BAILMENT—Pawnbrokers—Pawning Bailed Property.—Where the owner of a cornet loaned it to a third person, who pawned it for a loan of money without the owner's knowledge or consent, such owner is entitled to recover the instrument from the pawnbroker without first repaying the loan, since the bailee's possession was not such a conclusive indication of ownership as to relieve the pawnbroker from inquiry as to the real ownership or right of disposition.—SKORA v. MILLER, Ind., 57 N. E. Rep. 264.

7. BANKRUPTCY—Application for Discharge.—An application for a discharge in bankruptcy, with such briefs and pleas as may be made in opposition thereto, must be heard and determined by the judge of the court of bankruptcy. The decision of the question whether or not a discharge shall be granted cannot be delegated to a referee. But the application for discharge may be referred to the referee to ascertain and report the facts.—IN RE MCDUFF, U. S. C. C. of App., Fifth Circuit, 101 Fed. Rep. 241.

8. BANKRUPTCY—Assets — Contingent Remainder.—Where property is devised by will to trustees with directions to apply the income for the benefit of a named beneficiary during her life, and at her death to divide the estate in equal portions among such of the children of the testator as may then be living, and the issue of deceased's children, but with no specific devise to any child by name, none of the testator's children has any right or interest in the estate, during the lifetime of the first beneficiary, such as to be devisable or alienable under the laws of the State of New York as interpreted by its courts; and consequently, if one of such heirs is adjudged bankrupt while the life estate is still outstanding, he has no estate or interest under the will such as will vest in his trustee in bankruptcy as assets of his estate.—IN RE HOADLEY, U. S. D. C., S. D. (N. Y.), 101 Fed. Rep. 233.

9. BANKRUPTCY—Assets—License.—A license to occupy a stall in a city market is property of the licensee, which will pass to his trustee in bankruptcy; and the court of bankruptcy has power to order the bankrupt to transfer such license to his trustee, and to make such application to the licensing authorities for the reissue of the license to the trustee or his vendee as is customarily required by those authorities.—IN RE EMRICH, U. S. D. C., W. D. (Penn.), 101 Fed. Rep. 231.

10. BANKRUPTCY—Assets—Patents and Patent Rights.—A trustee in bankruptcy takes no title to a patent for an invention granted to the bankrupt after the date of the adjudication in bankruptcy, although the application for such patent was made before the bankruptcy, and was pending at the time of such adjudication.—IN RE MCDONNELL, U. S. D. C., N. D. (Iowa), 101 Fed. Rep. 239.

11. BANKRUPTCY—Exemptions—Concealment of Assets.—Where the exemption law of the State (Code Ga. § 2830) declares that a debtor shall forfeit his right to the exemption allowed, if he is guilty of willful fraud in concealing from his creditors any part of the property of which he is possessed at the time he seeks the benefit of the exemption, a bankrupt who does not make a full and fair disclosure of all the property owned by him at the time of the filing of his petition in bankruptcy is not entitled to have any exemption set apart to him by his trustee in bankruptcy.—IN RE WAXELBAUM, U. S. D. C., N. D. (Ga.), 101 Fed. Rep. 228.

12. BANKRUPTCY — Insanity of Respondent.—A court of bankruptcy will not take jurisdiction of a petition in involuntary bankruptcy against a person who, prior to the filing of such petition, had been formally and duly adjudged insane by a State court of competent jurisdiction, and for whose person and estate a guardian had been appointed by such court.—IN RE FUNK, U. S. D. C., N. D. (Iowa), 101 Fed. Rep. 244.

13. BANKRUPTCY—Liens—Taxes.—Where real estate of a bankrupt, mortgaged for more than its value, and also subject to the lien of taxes assessed thereon (the tax lien being made paramount to that of the mortgage by the laws of the State), is sold to the mortgagee, and his claim against the bankrupt's estate for the deficiency proved and allowed, the court will not order the taxes to be paid out of the funds of the estate, since such payment would operate to the benefit of the mortgagee, in prejudice of the rights of general creditors, and since the taxes are, in any event, secured.—IN RE VEITCH, U. S. D. C., D. (Conn.), 101 Fed. Rep. 251.

14. BANKRUPTCY—Partnership and Individual Debts.—A creditor of a firm, holding their promissory note for money loaned, surrendered the same, and accepted in lieu thereof the individual note of a member of the firm for the same amount; the assumption of the debt by that partner being part of the consideration for the purchase of an interest in the firm for her son-in-law. The latter note was twice renewed, and was finally reduced to a judgment against the maker. Within four months thereafter the partnership and its members became bankrupt. Held, that the debt was

that of the individual partner, not of the firm, notwithstanding the fact that the interest on the new note had always been paid by the firm, and that, since the firm creditors could not come upon the individual assets of that partner in competition with her individual creditors, the former had no standing to object to the judgment as a preference under the bankruptcy act, or to restrain the creditor from its enforcement.—IN RE LEHIGH LUMBER CO., U. S. D. C., W. D. (Penn.), 101 Fed. Rep. 216.

15. BANKRUPTCY—Proof and Allowance of Claims.—Bankr. Act 1898, § 57d, providing that claims which have been duly proved shall be allowed upon presentation to the court, unless objected to, or unless their consideration is continued for cause by the court on its own motion, intends that, if objection to a claim is interposed, or if the court is not satisfied with the *prima facie* case made out by the claimant's sworn statement, the claim shall not be accepted as proved until the objection has been disposed of, or until the court is convinced of the validity of the claim.—IN RE SUMNER, U. S. D. C., E. D. (N. Y.), 101 Fed. Rep. 224.

16. BANKRUPTCY—Proof and Allowance of Claims.—A creditor presenting a claim for proof and allowance against the estate of a bankrupt, which is contested by the trustee, is not entitled to demand a trial by jury. Proceedings in bankruptcy being of equitable cognizance, the seventh amendment to the constitution of the United States does not apply thereto, and no act of congress at present in force authorizes trial by jury in such cases.—IN RE CHRISTENSEN, U. S. D. C., N. D. (Iowa), 101 Fed. Rep. 243.

17. BANKRUPTCY—Provable Debts—Breach of Contract of Employment.—Where a person employed by a mercantile firm for a year on a fixed salary is discharged, without fault on his part, by a trustee to whom the employers had made a trust deed for the benefit of their creditors, on their becoming insolvent, before the expiration of the year, such employee has an immediate right of action against the employers for the breach of contract, the measure of damages being the amount he would have received under the contract for the remainder of the year, less such amount as he will be able to earn during that time from other sources; and, upon the bankruptcy of the employers, his claim for such damages becomes a debt which, after liquidation, may be proved and allowed against the estate in bankruptcy.—IN RE SILVERMAN, U. S. D. C., W. D. (Mo.), 101 Fed. Rep. 219.

18. BILLS AND NOTES—Bona Fide Holders.—Where the payee of a note taken under circumstances which would defeat an action thereon by him transfers it to a *bona fide* holder, and he subsequently retransfers it to the original holder, the latter has no greater rights than he had originally, and cannot maintain an action thereon.—HOYE V. KALASHIAN, R. I., 46 Atl. Rep. 271.

19. BILLS AND NOTES—Indorsers—Demand and Notice.—Judgment against indorsers of a negotiable note cannot be sustained on special findings showing no demand on the maker for payment, and notice to the indorsers of non-payment, and no waiver thereof.—LA FOLLETTE COAL & IRON CO. V. WHITING FOUNDRY EQUIPMENT CO., Ind., 57 N. E. Rep. 255.

20. BILLS AND NOTES—Non-Negotiable Notes—Indorsement.—Plaintiff and defendant, as partners, guarantied payment of non-negotiable notes to which they were strangers; indorsing one in blank, and another for value received. At maturity the maker failed to pay, and, the partnership being dissolved, plaintiff paid the notes. In an action to recover defendant's proportionate amount, the answer alleged that, on dissolution of the firm, plaintiff had agreed to pay the "indebtedness" of the firm. Held, that the indorsement of the firm were original engagements, binding the signers unconditionally to pay the notes, and within the indebtedness assumed by plaintiff.—WOODY V. HAWORTH, Ind., 57 N. E. Rep. 272.

21. CARRIERS OF GOODS—Bill of Lading—Liability Beyond Terminus of Line.—The receipt clause in a bill of lading, naming F as the destination of the stock to be shipped—a point beyond the terminus of the carrier's line, does not impose on it the liability of a carrier beyond such terminus, and hence does not conflict with the subsequent express stipulation that its liability as carrier shall cease at its freight station in P, the terminus of its line, or with the provision that, when necessary to transport the stock to point of destination over the line of any other carrier, delivery to such carrier may be made, and the original carrier shall not be liable for the negligence of such other carrier.—KELLER V. BALTIMORE & O. R. CO., Penn., 46 Atl. Rep. 261.

22. CHATTEL MORTGAGES—Crops—Delivery to Mortgagee.—Where wheat was delivered to a chattel mortgagee, sufficient to satisfy his claim under the mortgage, but no application of the proceeds was made until after the mortgagor had sold certain of the wheat to defendant, who had no knowledge that the mortgagee also had a claim against the mortgagor for advances, the mortgagee was not thereafter entitled to apply the proceeds of the wheat delivered to him on the advances, and then sue the defendant for the wheat delivered to him.—NIXON V. COLVERT, Ind., 57 N. E. Rep. 234.

23. COLLATERAL INHERITANCE—Bequests to Charities.—Under the statute relating to the collateral inheritance tax, and providing that all estates of every kind, of a person dying seised thereof, domiciled within or without the State, passing either by will or under the intestate law, other than to certain heirs and lineal descendants, shall be subject to tax, all property is subject, though part of it is bequeathed to charities.—IN RE FINNEN'S ESTATE, Penn., 46 Atl. Rep. 269.

24. CONSTITUTIONAL LAW—Eminent Domain—Agricultural Lands.—Const. 1894, art. 1, § 7, authorizing the passage of general laws permitting owners or occupants of agricultural lands to construct certain ditches on the lands of others under proper restrictions, and on payment of just compensation, is in violation of the federal constitution (Const. U. S. Amend. art. 14), as depriving a person of property without due process of law, in that it authorizes a citizen to take property by the exercise of the right of eminent domain primarily for his own benefit, not sanctioned as a public use, either by long acquiescence or by judicial or legislative precedent.—IN RE TUTHILL, N. Y., 57 N. E. Rep. 303.

25. CONTRACTS—Construction and Operation.—Where a contract to be wholly performed within a year between plaintiff and defendant, by which the former agrees to make application as defendant's assignor for patents for certain new and useful improvements in hat pouncing and finishing machines, the words "new and useful improvements" must be construed to mean only those then actually embodied in the machines, and those then existing in the mind of the plaintiff.—ADAMS V. TURNER, Conn., 46 Atl. Rep. 267.

26. CORPORATIONS—Action by Stockholder.—There is no necessity for the appointment of a special receiver to institute actions to recover from the officers and directors of a corporation, who hold a majority of its stock, property of the corporation, which a stockholder charges them with having illegally diverted and appropriated to themselves as salaries. The individual shareholder may himself bring such actions, by making the corporations, and the directors against whom relief is sought, parties.—MARCUSE V. GULLETT GIN MFG. CO., La., 27 South. Rep. 846.

27. CORPORATIONS—Charter—Capital Stock.—An informality in the vote taken to reduce the capital stock of a railroad corporation as authorized by Acts 1895, p. 19, did not affect the company's corporate existence.—BROWN V. WYANDOTTE & S. E. RY. CO., Ark., 56 S. W. Rep. 862.

28. CORPORATIONS—Stockholders' Liability—Transfer of Stock.—Where the holder of stock in a corpora-

tion has transferred his stock in good faith to one who, at the time of subjecting the stockholder's liability to the payment of the debts of the corporation, is insolvent, the liability of such assignor of stock may, subject to the rule established in Harpold v. Stobart, 21 N. E. Rep. 637, 46 Ohio St. 397, be subjected to the payment of debts which accrued while he held the stock, in case a sufficient fund is not raised by assessment upon solvent stockholders to satisfy all creditors.—WICK NAT. BANK v. UNION NAT. BANK, Ohio, 57 N. E. Rep. 320

29. COUNTIES—Allowance of Claims—Powers of Fiscal Court.—The fiscal court being a court of limited powers, and having no jurisdiction to appropriate county funds except as it is authorized by law to do so, an order making an allowance to the county clerk for services for which the statute fixed no compensation was void, and neither the clerk nor his assignee acquired any rights thereunder.—MORGANTOWN DEPOSIT BANK v. JOHNSON, Ky., 56 S. W. Rep. 825.

30. CRIMINAL EVIDENCE—Assault—Res Gestæ.—In a prosecution for assault with intent to murder, evidence of an assault on the mother of prosecutrix, contemporaneous with previous assaults on prosecutrix, is admissible as a part of the *res gestæ*, to illustrate his animus, motive, and malice in making such prior assaults on prosecutrix.—HAMILTON v. STATE, Tex., 56 S. W. Rep. 926.

31. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—To render a statement a dying declaration, no precise form of words is necessary to show that declarant was under belief of speedily impending death, and the fact that statements to this effect were made, in the first instance, subsequent to making the declaration, does not take away its probative force.—WINFREY v. STATE, Tex., 56 S. W. Rep. 919.

32. CRIMINAL LAW — False Pretenses—Indictment — Sufficiency.—Under Rev. St. 1889, § 3564, providing that any person, who, with intent to cheat and defraud, attempts to obtain from another any valuable by trick or deception or false statements, shall be deemed guilty of misdemeanor, an indictment was sufficient which charged that defendant on a certain day, with intent to defraud, falsely represented that a signature to a certain note was the signature of a certain person, by means of which false pretense he attempted to obtain money, since the intent to defraud and the attempt to obtain the property, which form the constituent elements of the crime, were charged, and the facts were sufficient to inform defendant and the court of the nature of the crime charged.—STATE v. WOODWARD, Mo., 56 S. W. Rep. 880.

33. CRIMINAL LAW—Homicide.—Where, after a quarrel, in which deceased and B compelled defendant to surrender money he had won from them at gambling, he went away and armed himself with a gun, and then sought out deceased and brought on a second quarrel, in which he shot him, it justifies a conviction of murder in the second degree.—STATE v. HARGROVES, Tenn., 56 S. W. Rep. 859.

34. CRIMINAL LAW — Homicide—Indictment.—An assault being a necessary ingredient of the crime of murder wherein a battery occurs, an indictment is fatally defective which fails to set forth the name of the person upon whom the assault was made.—STATE v. MEADOWS, Mo., 56 S. W. Rep. 878.

35. CRIMINAL LAW — Homicide — Indictment. — The omission of the word "unlawful" in an indictment for murder in this territory is not a fatal defect where the indictment, as in this case, clearly and distinctly alleges the facts showing a murder by the unlawful killing of a human being with malice aforethought. It is not necessary to use the very words of the statute defining the offense, it is sufficient if those used convey the same meaning.—RUIZ v. TERRITORY, N. M., 61 Pac. Rep. 126.

36. CRIMINAL LAW—Larceny—Possession.—The charge to the effect that the presumption ordinarily arising from the recent possession of goods alleged to have been stolen was not applicable to this case did not injure the accused, but was to his advantage; the charges as to reasonable doubt and the effect of circumstantial evidence were full and fair to the accused; and there was sufficient evidence to warrant the verdict.—JOSEPH v. STATE, Ga., 36 S. E. Rep. 61.

37. CRIMINAL LAW—Larceny from Dwelling.—Under Rev. St. 1889, § 3537, making it grand larceny to steal from a dwelling house, without regard to the value of the property stolen, it is not necessary, for a conviction of larceny from a dwelling, to prove the value of the property.—STATE v. WEBER, Mo., 56 S. W. Rep. 898.

38. CRIMINAL LAW — Murder—Negligence.—One who intentionally and recklessly discharges a gun at another, and death results therefrom, or in like manner fires a gun under such circumstances that an act of that character would naturally tend to destroy human life, would be guilty of murder.—AUSTIN v. STATE, Ga., 36 S. E. Rep. 32.

39. CRIMINAL LIBEL—Sufficiency of Affidavit and Information.—An information and affidavit which charged the publication of language not libelous *per se*, and stated that it was published concerning the prosecutrix, and that the defendant intended to charge that the prosecutrix was a lewd woman, and that the language was so understood by the public, is not sufficient to sustain a charge of criminal libel, as the facts showing the defamatory sense in which the language was used, to whom it referred, and to whom it was directed, should have been stated.—KELLEY v. STATE, Ind., 57 N. E. Rep. 357.

40. DEED—Cancellation.—An absolute deed of conveyance will not, at the instance of the grantor, be canceled merely because of a breach by the grantee of a promise made by him, in consideration of which the deed was executed.—BRAND v. POWER, Ga., 36 S. E. Rep. 53.

41. DEED—Grant of Oils and Minerals—Construction. — The owner of land granted to another the oil, gas, and other minerals underlying the land, on condition that the grantor should have a certain share of the oil, gas and minerals so mined. The grant provided that, if no well was completed by the grantee within 90 days from and after the date of the grant, the same should be null and void, unless the grantee should pay the grantor a certain rental for each year the completion of the well was delayed. It was further stipulated that the grantee should have the privilege of surrendering the lease at any time by paying the rental on the land to the time of surrender. Held, since it was optional with the grantee as to whether or not anything should ever be done by him, and as no well was made, there was no obligation to pay any rent, or to make compensation for oil or gas.—BROOKS v. KUNKLE, Ind., 57 N. E. Rep. 260.

42. DIVORCE—Foreign Divorce—Domicile of Plaintiff. Under Comp. Laws Dak. § 2578 (Laws S. D. 1890, ch. 105, § 1), requiring a plaintiff in a divorce suit to have been a resident of the territory 90 days before the commencement of the action, the residence of a citizen of another State in the territory for such time for the sole purpose of obtaining a divorce will not sustain a divorce granted in a suit instituted by him, when attacked by his wife in the State of his domicile.—ANDREWS v. ANDREWS, Mass., 57 N. E. Rep. 333.

43. DIVORCE — Marriage Relation—Dissolution.—No legal right to a divorce vests in a married person, since the married relation is a *status* fixed by law, which cannot be impaired by collusion or negligence, and can only be dissolved by the consent of the State, for causes deemed to make probable the better service of the interests of society thereby.—ALLEN v. ALLEN, Conn., 46 Atl. Rep. 242.

44. EJECTMENT — Adverse Possession — Estoppel.—Where land to which plaintiff had record title at the

time of suit brought to recover it had been held by defendant and his grantor adversely for seven years, during which plaintiff had received his deed from the owner, who was a married woman, such adverse possession did not bar plaintiff's title, since the statute of limitations did not run against his grantor during disability.—COOPER v. NEWTON, Ark., 56 S. W. Rep. 867.

45. EQUITABLE LIEN.—Act Ga. Feb. 17, 1873, authorized and required the Eagle & Phenix Manufacturing Company to pledge its entire capital stock and property for the payment of depositors in a savings department authorized to be established. The directors under authority of a stockholders' resolution, declared the entire property of the company pledged for the payment of such depositors. Held that such action of the stockholders and directors constituted an equitable lien upon such property in favor of depositors, or those who became depositors, in such savings department, though no particular person was named, enforceable against the company and others with notice.—NEWTON et al. v. EAGLE & PHENIX MANUFACTURING CO., U. S. C. C., W. D. (Ga.), 101 Fed. Rep. 149.

46. FRAUDS, STATUTE OF—Memorandum.—A memorandum of sale by C & Co., acting as selling agents of M S Co., to J H S & Son, sufficiently describes the purchaser and seller, under 3 Burns' Rev. St. Ind. 1894, § 6635, providing that no contract for the sale of any goods over $50 in value shall be valid unless some note or memorandum is made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.—AMERICAN IRON & STEEL MFG. CO. v. MIDLAND STEEL CO., U. S. C. C., D. (Ind.), 100 Fed. Rep. 200.

47. FRAUDULENT CONVEYANCES — Insolvency—Grantee's Notice.—Where an insolvent debtor conveyed all his property to his sons who took the conveyance with knowledge of his financial condition, and without parting with anything of value at the time, they were chargeable with sufficient notice to put them on inquiry, and hence became participants in the fraud.—REED v. LONEY, Wash., 61 Pac. Rep. 41.

48. FRAUDULENT CONVEYANCES — Preferences by Debtor.—In the absence of any law rendering preferences illegal, the organization by a debtor, with others, of a corporation, and his transfer of property to such corporation in consideration of stock therein issued to him, which he transfers to certain of his creditors, does not constitute a fraudulent conveyance of the property which can be set aside at suit of other general creditors.—FISCHER v. CAMPBELL, U. S. C. C. of App., Fifth Circuit, 101 Fed. Rep. 156.

49. HOMESTEAD—Undivided Interest in Realty.—A homestead in an undivided interest in certain lands cannot be laid off to the widow and children of the deceased owner.—ADCOCK v. ADCOCK, Tenn., 56 S. W. Rep. 844.

50. HUSBAND AND WIFE—Community Property—Conveyance.—A deed from a husband to the wife, though absolute on its face, and reciting as a consideration a sum named out of the "separate means" of the wife, may be shown by parol evidence to have been in fact without consideration, and not intended as a gift, nor to vest in the wife a separate estate, and that the insertion of the clause reciting the consideration named was without the knowledge of the grantor.—KAHN v. KAHN, Tex., 56 S. W. Rep. 946.

51. HUSBAND AND WIFE—Estate by Entireties.—Where defendants husband and wife, and tenants by entireties of certain real estate, execute deeds to a third person, who reconveys to the husband alone, such deeds being without consideration, and only for the purpose of vesting title in the husband singly, and the husband then mortgages the property to secure his individual debt, such mortgage is voidable both by husband and wife, since it would be so voidable if made by both without the intervening conveyances, and what cannot be done directly cannot be done by indirection.—ABICHT v. SEARLS, Ind., 57 N. E. Rep. 246.

52. HUSBAND AND WIFE—Wife's Separate Property.—When a husband receives property of his wife, and with her knowledge and consent deals with it as his own, without any express promise to repay, the presumption is that it was not a gift, but that he took the property as trustee for her.—KING v. KING, Ind., 57 N. E. Rep. 276.

53. INJUNCTION—Sale of Personal Property for Taxes.—An action for injunction will lie to restrain a county treasurer from removing and selling for delinquent taxes counters and shelving which have been purchased by plaintiff from the tax delinquent for value, without notice of any lien for taxes thereon, and affixed to plaintiff's building, and which it is alleged cannot be removed without destroying plaintiff's business and causing him great and irreparable damage, which cannot be compensated or estimated in money.—PHELAN v. SMITH, Wash., 61 Pac. Rep. 31.

54. INJUNCTION—Supersedeas.—A court rendering a decree granting an injunction has the power, if the purpose of justice require it, to order a continuance of the *status quo* until a decision shall be made by the appellate court, or until that court shall order the contrary, and the power should always be exercised when any irremediable injury may result from the effect of the decree as rendered. Hovey v. McDonald, 3 Sup. Ct. 136, 109 U. S. 161, 27 L. Ed. 888; Leonard v. Land Co., 6 Sup. Ct. 127, 115 U. S. 468, 29 L. Ed. 445.—INTERSTATE COMMERCE COMMISSION v. L. & N. R. R. Co., U. S. C. C., S. D. (Ala.), 101 Fed. Rep. 146.

55. INSTRUCTIONS—Appeal.—Where the instructions, considered as a whole, state the law fully and fairly, it is not reversible error that one of them, correct as far as it goes, makes an incomplete statement of the law.—MAXON v. CLARK, Ind., 57 N. E. Rep. 260.

56. INSURANCE—Fraud of Insured—Recovery.—Where a fire policy for an entire premium, covering a house and the furniture therein under separate valuations, provided that the entire policy should be void if the insured concealed or misrepresented any material fact concerning the insurance, whether before or after the loss, and insured in the agreed statement of facts admits fraud in the proof of loss as to the furniture, no recovery could be had for loss of the house; the contract not being severable.—HOME INS. CO. v. CONNALLY, Tenn., 56 S. W. Rep. 828.

57. JUDGMENTS — Enjoining Execution.—Where a court of equity had jurisdiction to intervene by a decree enjoining an execution issued on a judgment rendered against a party by fraud, accident, or mistake, without default on his part, it was not deprived of such jurisdiction by the fact that such party had a remedy for the wrong by writ of error *coram nobis*.—WILLIAMS v. PILE, Tenn., 56 S. W. Rep. 833.

58. JUDGMENTS—Personal Liability of Trustee.—Where, in an action to recover goods held by defendant as trustee for the benefit of creditors, it was adjudged that plaintiffs recover of the defendant M, "as trustee," the costs incurred by them, plaintiffs are entitled to execution for costs against the property of M; the judgment not being limited by the use of the words "as trustee."—SASS v. HIRSCHFELD, Tex., 56 S. W. Rep. 941.

59. LANDLORD AND TENANT—Lease — Expiration—Holding Over.—Where plaintiff's lease of hotel rooms provided that the landlord might enter peaceably and take possession for non-payment of rent, and plaintiff held over after the expiration of the lease under an oral agreement, and thereafter paid rent at the rate stipulated in the lease, such holding was under the terms of the lease.—FAXON v. JONES, Mass., 57 N. E. Rep. 360.

60. LANDLORD AND TENANT—Liability for Injuries to Third Persons.—A landlord is not liable for injuries received by a third person from a falling stone from a

house occupied by his tenants under a five-year lease, three years after the letting, where the tenants covenant to keep the building in repair.—MONROE v. CARLISLE, Mass., 57 N. E. Rep. 332.

61. LANDLORD AND TENANT—Right to Renew—Assignment.—Where a lease provides that the tenant shall have the right of renewal, such right may be assigned.—MCCLINTOCK v. JOYNER, Miss., 27 South. Rep. 537.

62. LIFE INSURANCE—Purchase of Policy by Company—Premium.—An insurance company, under contract to pay plaintiff, as its agent, certain commissions on premiums paid and received by it, on insurance written by him, after the issuance of a policy, and accepting a portion of the first annual premium, and having in its possession non due paper for the balance of such premium, may not, for a consideration and by the surrender of such notes, purchase the surrender of such policy so as to defeat plaintiff's right to commission, without proof of fraud in procuring the issuance of the policy or an express waiver by plaintiff.—REED v. UNION CENT. LIFE INS. CO. OF CINCINNATI, Utah, 61 Pac. Rep. 21.

63. MANDAMUS—Insignia of Office—State Officer.—One who possesses *prima facie* title to an office may compel delivery to himself of the books, papers, seal, and other property, insignia, and paraphernalia of such office, by a proceeding in *mandamus;* and the question of the actual or ultimate title to the office may not be raised in such proceeding, but must be reserved for an appropriate proceeding brought directly for the purpose.—ELDODT v. VAUGHN, N. Mex., 61 Pac. Rep. 105.

64. MARRIAGE—Breach of Marriage Promise—Validity.—A contract of marriage, to be consummated on the death of the divorced wife of a party thereto, is broken by the marriage of such party to another woman, although the divorced wife is still living, and he might be able to marry the plaintiff at her death.—BROWN v. ODILL, Tenn., 56 S. W. Rep. 840.

65. MECHANICS' LIENS—Mining Plant—Machinery.—Illuminating oil, mica grease, lubricating oil, and gasoline for fuel used in a mining plant did not enhance the value nor become part of the machinery, and hence were not lienable, within Code Civ. Proc. § 2130, providing that every person furnishing material for any machinery, fixture, or building shall have a lien therefor.—APPEAL OF CONTINENTAL OIL CO., Mont., 60 Pac. Rep. 8.

66. MORTGAGES—Action to Recover Possession.—A mortgagee in a chattel mortgage which provides that he shall be entitled to possession after default may, after default, maintain replevin to obtain possession of the chattels, though he does not seek to foreclose the mortgage in such action, notwithstanding Code Civ. Proc. § 726, which provides that there can be but one action for the recovery of a debt, or the enforcement of any right secured by mortgage on personal property.—HARPER v. GORDON, Cal., 61 Pac. Rep. 84.

67. MORTGAGE—Collateral Guaranty.—By the terms of a loan to a corporation, plaintiffs took as security a second mortgage, which was not to be recorded; and, in consideration of the note and mortgage, defendants guarantied payment at the times and according to the terms expressed in the note and mortgage, and further pledged 1,500 shares of the capital stock of the company procuring the loan. Held, that the guaranty was not one with a condition precedent to the enforcement of defendants' liability that the mortgage be foreclosed, but was absolute and unconditional, under Civ. Code, § 2866, providing that a guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor.—PIERCE v. MERRILL, Cal., 61 Pac. Rep. 64.

68. MORTGAGE — Equitable Mortgage—Limitations.—Where a deed absolute on its face was given as a mortgage, the grantee cannot maintain a suit to declare it a mortgage, and set up limitations as a bar to the debt, as limitations do not commence to run until the entering of a decree converting the deed into a mortgage.—PARIS v. POSS, Tenn., 56 S. W. Rep. 835.

69. MORTGAGES—Foreclosure — Purchase by Mortgagee.—Where a mortgagee sells mortgaged land on foreclosure under the power of sale in the mortgage, and himself becomes the real purchaser thereof, through the intervention of a third person, the mortgagor may disaffirm the sale and have a new sale ordered.—AUSTIN v. STEWART, N. Car., 36 S. E. Rep. 87.

70. MORTGAGE—Subrogation—Payment and Satisfaction of Mortgage.—One who loans money to a mortgagor for the express purpose of paying the mortgage debt, and who himself makes such payment, is not a volunteer; and although he has the mortgage satisfied of record, taking a new one on the same property, he is entitled to be subrogated to the lien of the prior mortgage, as against one who acquired an interest in the property before its release, and subject thereto, of which fact the second mortgagee had neither actual nor constructive notice.—RACHAL v. SMITH, U. S. C. C. of App., Fifth Circuit, 101 Fed. Rep. 159.

71. MUNICIPAL CORPORATIONS—Bridges—Duty to Repair.—When the corporate limits of a city are so extended as to embrace therein a portion of a public highway, and a bridge over a stream crossing the same, the municipal authorities at once acquire the right to exercise jurisdiction over the bridge, and are chargeable with the duty of keeping it in repair after the county authorities have expressly relinquished such jurisdiction, which they may do with or without the assent of the municipal authorities.—COMMISSIONERS OF ROADS AND REVENUES OF POLK CO. v. MAYOR, ETC., OF CEDARTOWN, GA., 36 S. E. Rep. 50.

72. MUNICIPAL CORPORATIONS — Excavations—Negligence—Independent Contractor.—Where an excavation in an alley was made in conformity with the specifications under which the work was let, the injury resulting therefrom was the proximate and necessary result of the work contracted for, and therefore the city is liable, though it may have employed an independent contractor to do the work.—CITY OF LOUISVILLE v. SHANAHAN, Ky., 56 S. W. Rep. 808.

73. MUNICIPAL CORPORATIONS — Improvements—Collateral Attack.—Where a contractor hired certain members of the city council at high wages to superintend the building of a sewer, and through the influence thereby obtained over the council secured the acceptance of the work, which was not done according to the contract, such action was sufficient to subject the acceptance of the work to a collateral attack for fraud by a property owner resisting an assessment for the improvement.—GREEN v. SHANKLIN, Ind., 57 N. E. Rep. 269.

74. MUNICIPAL CORPORATIONS — Water Courses—City Streets.—Where necessary changes were made in the surface and grade of a city's highways, whereby surface water was caused to flow onto a dooryard without definite channel in times of heavy rainfall, no recovery can be had from the city for damages resulting therefrom in an action based on the proviso of Gen. St. § 2683, prohibiting making or clearing of a water course or place for draining off water from the highway into any dooryard, though such highway might have been so graded as to prevent such flow.—DOWNS v. CITY OF ANSONIA, Conn., 46 Atl. Rep. 243.

75. NATIONAL BANKS—Insolvency—Liability to Depositor.—The fact that certificates of deposit issued by a national bank to a State treasurer in his official capacity, for money of the State deposited, were surrendered by his successor in office, who had the amount credited in his general account as treasurer, cannot affect the liability of the bank to the State for the money actually deposited, and which was never repaid, nor does it justify its receiver in contesting the claim of the State or its treasurer therefor, where there is no defense to such claim on its merits.—MCDONALD v. STATE OF NEBRASKA, U. S. C. C. of App., Eighth Circuit, 101 Fed. Rep. 171.

76. NATIONAL BANKS—Usury.—Under Rev. St. U. S. § 5198, providing that, where a national bank knowingly

charges a greater rate of interest than is permitted by the laws of the State where it is located, the person paying it may, within two years from the transaction, recover back twice the amount of such interest, in an action in the nature of debt, such an action cannot be maintained where plaintiff does not allege or prove that he was paid or tendered the principal sum due.—HASELTINE V. CENTRAL NAT. BANK. Mo., 56 S. W. Rep. 895.

77. NEGLIGENCE — Boiler Explosion — Evidence.—Where the evidence of the owner of a building, injured by a steam boiler explosion in a hotel adjacent thereto, failed to show that the boiler was not properly constructed and out of good materials, or that defendants were negligent in its use and maintenance, the fact of the explosion raised no presumption of negligence, and hence the granting of a nonsuit was proper.—BISHOP V. BROWN, Colo., 61 Pac. Rep. 50.

78. NEW TRIAL—Negligence of Attorneys.—The neglect of attorneys of record to pursue and follow up the cases pending in courts of record wherein they appear of record as attorneys in certain cases, by reason of which neglect default judgment is rendered against one of their clients, is not a ground for a new trial.—LIVERPOOL & L. & G. INS. CO. V. PERRIN, N. Mex., 61 Pac. Rep. 124.

79. PARTNERSHIP—Continuance after Death of Partner.—Insolvency of a partner, unknown to the others, at the time a partnership is formed, the agreement providing for continuance of the firm for a certain number of years though a partner dies, is not a fraud on his creditors, so as to authorize a forced dissolution on his death.—BREW V. HASTINGS, Penn., 46 Atl. Rep. 257.

80. PARTNERSHIP—Joint-Stock Company.—A company organized for the purpose of building a house for and maintaining a school was not a corporation, but a partnership, and subject to the rules governing commercial partnerships, though the stock was divided into shares, and each member was to have one vote for each share he owned; it being provided that the officers of the company shall be "the trustees of said institution.—SEBASTIAN V. BOONEVILLE ACADEMY CO., Ky., 56 S. W. Rep. 810.

81. PLEADING—Parties — Persons Entitled to Sue.—The purchaser of railroad property at foreclosure sale, who acts, in making the purchase, for other parties, to whom he at once transfers the title, cannot thereafter maintain a petition to require the receiver of the property during the foreclosure proceedings to pay taxes assessed thereon during the receivership; having no interest, personal or fiduciary, in the question which he seeks to litigate.—BOYLE V. FARMERS' LOAN & TRUST CO., U. S. C. C. of App., Fifth Circuit, 101 Fed. Rep. 184.

82. PLEDGE—Rights of Pledgee—Larceny.—Where, by special contract, a chattel is pledged by one as security for his debt, the pledgee has a special property in the thing pledged; and when the pledgor takes the property from the pledgee's control and possession with a fraudulent intent of depriving the pledgee of the security, he may be convicted of larceny under a charge of stealing property belonging to the pledgee.—HENRY V. STATE, Ga., 36 S. E. Rep. 55.

83. RAILROAD COMPANY—Construction in Street—Action for Damages.—The rule that an action for damages naturally resulting from the proper operation of a railroad in the streets of a city is barred after five years from the time the action might first have been instituted, does not apply where the construction of the road in the street was not authorized by legislative and municipal authority.—KLOSTERMAN V. CHESAPEAKE & O. RY. CO., Ky., 56 S. W. Rep. 820.

84. RAILROAD COMPANY—Contributory Negligence.—No recovery can be had for the killing of a person by a train running through an incorporated town at an illegal rate of speed, when the negligence of deceased contributed to his death.—COLLINS V. ILLINOIS CENT. R. CO., Miss., 27 South. Rep. 887.

85. RAILROAD COMPANY—Killing Animals—Lessor's Negligence.—Under Sand. & H. Dig. §§ 6321, 6338, giving one railroad company the privilege of leasing its road and equipment to another company, where the defendant company had made such a lease, and the road was under the control and operation of the lessee when the plaintiff's animal was killed, the lessor was not responsible for the damage sustained.—LITTLE ROCK & FT. S. RY. CO. V. DANIELS, Ark., 56 S. W. Rep. 874.

86. RAILROAD COMPANY — Street Railroads — Negligence.—Where plaintiff's intestate, running diagonally across the street to the corner where defendant's street car stopped to take on passengers, and waiving her handkerchief to the motorman of an approaching car, as a signal to stop, crossed one of defendant's tracks, and in attempting to cross the second was struck by the car and killed, she was guilty of contributory negligence as a matter of law, in attempting to cross the track in front of the car, which she knew was coming.—GRIFFITH V. DENVER CONSOL. TRAMWAY CO., Colo., 61 Pac. Rep. 46.

87. RAILROAD COMPANY—Street Railways — Employment of Physician.—Where plaintiff was injured in an accident on a street railway, and had brought suit for the injury, and the company sent a doctor to examine him, and he directed plaintiff, who claimed he could not stand on his left leg, to try and stand on it, and in the effort to do so plaintiff fell, from the effect of which he became subject to hysterical trouble, the company was not liable for the injury occasioned thereby, since the physician in making the examination was an independent contractor, distinctly free from the control or direction of his employer.—PEARL V. WEST END ST. RY. CO., Mass., 57 N. E. Rep. 339.

88. RECEIVERS—Appointment.—Foreign receivers to sue in the State should obtain leave of the court, but the better rule is to have local receivers appointed.—PERSON V. LEARY, N. Car., 36 S. E. Rep. 35.

89. RECEIVER IN STATE COURT—Jurisdiction over Property.—Where a receiver has been appointed by a State court, or property has been transferred by operation of law, such receiver has no extraterritorial jurisdiction over property, except that which is found within the territorial limits of the State wherein he was appointed, and such transfers have no force upon property outside of the State were they are made.—THUM V. PINGREE, Utah, 61 Pac. Rep. 18.

90. REMOVAL OF CAUSES—Time for Filing Application.—Where, by reason of an amendment of the complaint in a State court, a defendant becomes entitled to remove a cause not before removable, he is entitled to a reasonable time after such amendment within which to file his petition and bond for removal; and, where the statute fixes no time within which he is required to answer or plead to the amended complaint, the time prescribed therefor by a rule of court will, by analogy, be taken as the time within which he must file his application for removal, unless it appears that such time is unreasonably short.—ENDERS V. LAKE ERIE & W. R. CO., U. S. C. C., D. (Ind.), 101 Fed. Rep. 202.

91. SPECIFIC PERFORMANCE—Sale of Chattels.—Sale of license for the unexpired portion of the year, and of the lease and fixtures of a barroom, will not be specifically enforced after expiration of the time which the license covers.—MEEHAN V. OWENS, Penn., 46 Atl. Rep. 263.

92. STATE—Capture of Escaped Felon—Reward.—Under Ann. Code, § 4248, providing that any person having a claim against the State may sue it thereon, after demand made of the auditor of public accounts, and his refusal to issue a warrant therefor, suit cannot be maintained against the State to recover a reward offered by him for the apprehension and conviction of a felon; the auditor having no power to audit such claim, and the refusal of the governor to direct him to issue a warrant therefor being a final adjudication of its invalidity, which the courts have no jurisdiction to review.—STATE V. DINKINS, Miss., 27 South. Rep. 882.

93. TAXATION—Interstate Commerce—Original Package.—Where one, purporting to act as agent of a non-resident principal, sells goods by sample to residents of the State, and forwards his orders to a branch house outside the State though there is a branch house within the State, and the bill for the goods shows they were consigned and charged to the agent individually, without reference to the purchasers, and on receipt of the original package the agent breaks it and delivers the articles to the different purchasers, the transaction does not constitute interstate commerce, so as to exempt the agent from paying a privilege tax and obtaining a license as required by the laws of the State. —KIMMELL v. STATE, Tenn., 56 S. W. Rep. 854.

94. TENANTS IN COMMON—Adverse Possession.—Possession of premises by one of two tenants in common thereof, not having been adverse for 20 years, is deemed the possession of both tenants.—CONKEY v. JOHN L. ROPER LUMBER CO., N. Car., 36 S. E. Rep. 42.

95. TRADE-NAMES—Name of Corporation.—A foreign corporation, doing business in a State only by license, has no standing in a court of equity to question the right of a corporation of the State to do business therein under the name by which it was chartered, on the ground that such name is similar to its own, that it has an exclusive right to its use. — CONTINENTAL INS. CO. v. CONTINENTAL FIRE ASSN., U. S. C. C. of App., Fifth Circuit, 101 Fed. Rep. 101.

96. TRUSTS—Discretion of Trustees.—Where an agreement for a trust provides that there shall be a trust only on the proposed trustees deciding the plan operative, the court cannot usurp their discretion, and declare it operative, without a clear showing that the conditions precedent to its success existed, and that the trustees arbitrarily or fraudutently refused to perform a plain duty.—NATIONAL BANK OF WEST GROVE V. EARLE, Penn., 46 Atl. Rep. 268.

97. VENDOR AND PURCHASER—Assignment of Title Bond—Lien.—Where the vendor surrendered the purchaser's note for the price, and accepted in lieu thereof the joint note of the purchaser and W, embracing therein also the price of land sold to W, he waived his lien, as against a subsequent purchaser who took an assignment of the title bond, which failed to show that any part of the purchase money remained unpaid. —BROWN v. BLANKENSHIP, Ky., 56 S. W. Rep. 817.

98. VENDOR AND PURCHASER—Puachase Money—Innocent Purchaser.—Where defendant's husband, who was acting as her agent, had actual notice of plaintiff's lien on the land purchased before the deed was made or he had paid the purchase price, the defendant was not an innocent purchaser.—FORSYTHE v. BRANDENBURG, Ind., 57 N. E. Rep. 247.

99. WAREHOUSEMEN—Bailment—Storage of Grain.—The owner of grain delivered it to a warehouseman under a written agreement reciting the receipt of the grain and the warehouseman's agreement to pay the market price per bushel at any time up to a designated date, and that it was held subject to the owner's risk of loss by fire. The grain was placed in bins, and mixed with grain of like quality belonging to other persons. The warehouseman sold grain from such bins, but at all times had on hand a sufficient quantity of grain of like quality to redeliver to the depositors the quantity deposited by them. Held, that the transaction constituted a bailment, and not a sale, and that the warehouseman was not liable for the market price when not demanded until after loss by fire.—MCGREW v. THAYER, Ind., 57 N. E. Rep. 262.

100. WATERS—Appropriation—Priority.—Capacity of ditch alone does not constitute a valid appropriation of water, unaccompanied by application of the water to some beneficial use.—MILLHEISER v. LONG, N. M., 61 Pac. Rep. 111.

101. WATERS—Obstruction and Diversion—Injunction. —In an action brought solely to restrain defendants from obstructing the flow of certain waters, where it appears that during the period complained of other persons, not parties to the action, diverted water from the same stream to such an extent that it cannot be sufficiently shown that, but for the acts of the parties not sued, no injury would have resulted to the plaintiff, an injunction will not be granted.—WEST POINT IRR. CO. v. MORONI & MT. PLEASANT IRR. DITCH CO., Utah, 61 Pac. Rep. 16.

102. WILLS — Construction — Intent.—Testator provided that his estate should be valued by commissioners, and divided *per stirpes* among his children and grandchildren, and that in such division equality should be the controlling rule. One son was given a life estate in a house and lot, with remainder to his children and their descendants, *per stirpes*, but this property was to be valued by the commissioners, and charged against the share of such son. Before the commissioners' appraisement a serious loss occurred by fire. Held that, as equality was the manifest intention, the valuation should be made as of the date of appraisement, when made in a reasonable time after the testator's death, and not as of the time of his death, and the house and lot epecially set apart to the one son should be called on to contribute in making good the loss, on such basis as would preserve the equality required.—EAST v. BURNS, Tenn., 56 S. W. Rep. 830.

103. WILLS—Legacy — Distribution.—A testator gave the residue of his personal estate to the children of his deceased brothers and sisters, to be divided among them, "as provided in the statutes of the commonwealth." Pub. St. ch. 135, § 3, cl. 2, incorporating into it Pub. St. ch. 125, § 1, cl. 5, provides that where a decedent leaves no issue, and no father or mother or brother or sister, his estate shall go to the issue of any deceased brother or sister by right of representation. Held, that testator had reference to such statute, and hence the legacy should be divided into as many parts as there were children, one part to be given to each child living at the testator's death, and one part to go to the issue of each child who had died prior to the making of the will, by right of representation.—IN RE PAINE, Mass., 57 N. E. Rep. 346.

104. WILLS — Residuary Clause — Void or Lapsed Legacies.—The rule which adopts a construction more favorable to the residuary legatee with respect to void or lapsed legacies than is applied with respect to void or lapsed devises does not obtain in this State. The will should be construed, in either case, so as to give effect to the intention of the testator as fairly ascertained from a consideration of all its provisions and his situation at the time of its execution.—DAVIS v. DAVIS, Ohio, 57 N. E. Rep. 317.

105. WILL—Revocation—Loss of Subsequent Will.—Under Ky. St. § 4833, providing that "no will or codicil, or any part thereof, shall be revoked unless by the marriage of the testator, or by a subsequent will or codicil or by some writing declaring an intention to revoke the same executed in the manner in which a will is required to be executed," where a will is contested on the ground that it was revoked by a subsequent will, which has been lost, the burden is on the contestants to show the due and proper execution of the subsequent will, and also that it expressly revoked the will in contest, or was substantially inconsistent therewith.—MULLER v. MULLER, Ky., 56 S. W. Rep. 802.

106. WILLS — Words of Limitation.—Testator bequeathed one moiety of his estate, both real and personal, after payment of all just claims against his estate, to his "brothers and sisters and their heirs," subject to the life estate of the testator's wife. When the will was executed testator had brothers and sisters living, and nephews and nieces, the issue of deceased brothers and sisters. Held, that the words, "and their heirs," were words of limitation, applying only to heirs of brothers and sisters living on testator's death, and hence that the nephews and nieces are not entitled to take under the will.—ADAMS v. JONES, Mass., 57 N. E. Rep. 362.